IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5881

ROBERT EDWARD MARSHALL,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 15, 1971 —Petitioner's pro se motion to correct sentence under 28 U.S.C. § 2255 filed in United States District Court for the Northern District of California in San Francisco, California.

October 15, 1971 —Order entered granting leave to proceed in forma pauperis, appointing counsel, and order to show cause issued.

December 10, 1971—Response of United States to Order to Show Cause filed.

February 3, 1972 —Order denying motion to correct sentence entered.

February 9, 1972 —Motion to reopen hearing filed.

February 16, 1972 —Notice of appeal filed.

March 15, 1972 —Record docketed in Court of Appeals.

November 15, 1972—Opinion and Judgment of the Court of Appeals for the Ninth Circuit entered.

December 13, 1972—Order amending opinion by adding footnote filed.

Robert E. Marshall, in Pro Per
Reg. No. 34194
P.O. Box 1000
Steilacoom, Washington 98388

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

Civil Case No. C 71-1985

CR-71-8-RFP

ROBERT EDWARD MARSHALL, PETITIONER

vs.

J. J. PARKER, WARDEN, RESPONDENT,
UNITED STATES OF AMERICA, REAL PARTY IN INTEREST

PETITION FOR APPLICATION OF A WRIT OF HABEAS CORPUS PURSUANT TO TITLE 28 U.S.C. § 2255

COMES NOW, Robert Edward Marshall, petitioner above named, and hereby makes application in this Court for the issuance of a Writ of Habeas Corpus directing the Respondent to return this petitioner to this Court for vacation of sentence and commitment for examination and treatment under the Narcotic Addict Rehabilitation Act of 1966.

JURISDICTION REQUISITES

The statutory provision conferring upon this Court's jurisdiction to provide the relief herein sought is 28 U.S.C. § 2255 in that petitioner's confinement is in violation of the constitution of the United States.

PERTINENT FACTS

1. Petitioner appeared before and was sentenced by the Honorable Judge R. F. Peckham.

2. Petitioner is presently confined in the United States Penitentiary at McNeil Island, Washington.
3. Petitioner was sentenced by this Court to a ten-year term for a violation of 18 U.S.C. 2113 (a), Entering a bank with intent to commit a felony.
4. This is petitioner's first collateral attack upon his conviction.

SPECIFICATION OF ERROR

The sentencing Court erroneously denied this Petitioner unconstitutionally, an examination and treatment under Title 18 U.S.C. 4252, 4253, by denying him solely on the basis that petitioner was a prior offender. The Court erroneously sentence petitioner to Prison, contrary to the Court's findings that petitioner was an addict, and layed within the realm of Title 18 U.S.C. sec. 4251-4253: offenders addiction, or a likelihood of offender's rehabilitation through treatment.

The sentencing Court found the sole evidence of petitioner's addiction and his likelihood of rehabilitation through examinations and treatment was in the affirmative, as this Court's recommendation to the Bureau of Prisons, therefore, the Court's refusal to commit petitioner for examination and treatment under the Narcotic Addict Rehabilitation Act was error.

STATEMENT OF FACTS

Appellant was convicted of entering a bank with intent to commit a felony in violation of Title 18 2113(a). This was the results of a guilty plea. Petitioner was represented by counsel at all proceedings.

ARGUMENT

The order of events implicit in the Narcotic Addict Rehabilitation Act of 1966, Title 18 U.S.C. § 4251-4253, called for the court to first evaluate whether the individual before it qualifies as an eligible offender.

The sole reason this Court gave for not going through with the agreement in the "plea bargaining" was that the petitioner was not an "eligible offender" in accords with Title 18 U.S.C. 4251(f)(4) which states:

> (4) an offender who has been convicted of a felony on two or more prior occasions.

But, this is contrary to the President's Advisory Commission on Narcotic and Drug Abuse.

As is stated in *Watson* v. *United States* 439 F.2d 442 (D.C. Cir. 1970):

> "It is the fourth of these exclusions which was thought, by reason of the two prior federal narcotics offenses reported in the sentencing information, to bar appellant from being a candidate for disposition under Title II. The Narcotic Addict Rehabilitation Act of 1966 had its source in the report of the President's Advisory Commission on Narcotic and Drug Abuse, redered in November, 1963, by a distinguished group of experts under the chairmanship of our beloved senior colleague, E. Barrett Prettyman. The statute envisioned in that report did not contemplate any disqualification resting upon two prior felony convictions, and it would appear from the stated purposes of the report that any such disqualification so broadly conceived would be in hopeless conflict with the findings and recommendations of the commission".

The D.C. Cir. continued by saying:

> "one who, like appellant, suffered criminal convictions on two occasions before 1966, is denied the rehabilitative possibilities of the new approach. Certainly when those two prior conviction are possible upon a mere showing by the Government of an addict in possession, we think the discrimination between the two classes of addicts is constitutionally unacceptable. As the Supreme Court has said in another, but not entirely irrelevant, context: 'Equal Protection does not require that all persons be dealt with

identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made' ".

Here all of petitioner's convictions were prior to 1966. Therefore, this ruling would hold true in this instant case at bar. In conclusion the Watson Court held:

> "Appellant was conceded to be a narcotics addict of long standing; and this is the only fact crucial to our holding. His eligibility would have been patent but for the two prior convictions * * * * *. We hold only that the two-prior-felony disqualifying exclusion of Title II, as applied to appellant on these facts, is unconstitutional under the concept of equal protection embodied in Due Process clause of the Fifth Amendment." Also see *United States* v. *Phillips*, 403 F.2d 963 (6th Cir. 1968); *United States* v. *Williams*, 442 F.2d 738 (D.C. Cir. 1970).

The question presented by Title 18 U.S.C. 4251 (b) (f) (1) as to the eligibility of a narcotic addict to be deterined by the nature of lack of violence in the committed offense, raises the question of equal protection and the constitutionality of that sub section under the *Watson* rational. The Supreme Court pointed out in *Scales* v. *United States*, 367 U.S. 203, 211 (1961):

> "Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute".

CONCLUSION

For the foregoing reasons this petitioner's sentence should be vacated and be given consideration to Title II of the Narcotic Addict Rehabilition Act.

Respectfully submitted

/s/ Robert Edward Marshall—ProPer

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-71-1985—RFP

ROBERT E. MARSHALL, PETITIONER

v.

J. J. PARKER, Warden, RESPONDENT

ORDER PERMITTING ACTION TO BE FILED IN FORMA PAUPERIS AND APPOINTING COUNSEL, AND ORDER TO SHOW CAUSE

* * * *

Defendant herein has filed a petition pursuant to 28 U.S.C. § 2255 to modify his sentence to ten years in prison for violation of 18 U.S.C. § 2113 (a), which sentence was imposed by this Court on February 9, 1971 after defendant pleaded guilty.

Affidavit having been presented in compliance with the provisions of 28 U.S.C. § 1915

IT IS ORDERED that the Clerk file said affidavit and the petition, without prepayment of the Clerk's filing fee, or the giving of security therefor.

Based upon the petition filed herein and good cause appearing;

IT IS ORDERED that Respondent file a return with this Court on or before the 3rd day of November 1971, to show cause, if any there be, why the petition should not be granted herein;

IT IS FURTHER ORDERED that the Clerk of this Court forthwith serve a copy of this Order upon Respondent as well as upon Petitioner and his counsel as appointed *infra*, and also serve a copy of the petition and of this Order upon official counsel for Respondent, and that Respondent serve a copy of the return upon Petitioner and his counsel as appointed *infra* prior to the filing thereof;

IT IS FURTHER ORDERED that if Petitioner files a traverse to the return, Petitioner shall do so prior to the date next below specified;

IT IS FURTHER ORDERED that Mr. James Hewitt, United States Public Defender, serve as counsel for Petitioner in this proceeding; and

IT IS FURTHER ORDERED that Respondent or counsel for Respondent appear in person before this Court on the 15th day of November 1971, to complete compliance with this Order to Show Cause.

Dated: October 8, 1971

/s/ Robert F. Peckham
United States District Judge

JAMES L. BROWNING, JR.
United States Attorney

JAMES L. HAZARD
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Attorneys for Respondents.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed Dec. 10, 1971, C. C. Evensen, Clerk]

Civil Number 71-1985—RFP

ROBERT E. MARSHALL, PETITIONER

vs.

UNITED STATES OF AMERICA and
J. J. PARKER, WARDEN, RESPONDENT

RESPONSE OF UNITED STATES OF AMERICA TO PETITIONER'S MOTION TO VACATE SENTENCE PURSUANT TO TITLE 28 USC § 2255

We respectfully request that Robert E. Marshall's petition to vacate sentence pursuant to Title 28 U.S.C. § 2255 be denied. Petitioner alleges that he was unconstitutionally deprived of the benefits of the Narcotic Addict Rehabilitation Act of 1966, Title 18 U.S.C. § 4251, 4252, 4253, and prays that his sentence be vacated under Title 28 U.S.C. § 2255.

Petitioner was sentenced to a ten year term by the District Court for the Northern District of California for violation of Title 18 U.S.C. § 2113(a), to wit: entering a bank with the intent to commit a felony. (R.T., p. 9, 18:24).

Petitioner at PB2; 13-21 argues that the sole reason the Court gave for not sentencing petitioner under the Narcotic Addict Rehabilitation Act was that petitioner was not an "eligible offender" in accord with Title 18 U.S.C. § 4251(f)(4). Title 18 U.S.C. § 4251(f)(4) excludes from coverage:

> "an offender who has been convicted of a felony on two or more occassions."

The Court according to petitioner, would not follow the "plea bargained" recommendation of counsel, and instead sentenced petitioner to 10 years in the Federal Penitentiary. (PB2:17-21).

The gravaman of petitioner's argument is the classification defined by Congress at Title 18 U.S.C. § 4251(a)(4) is unreasonable and a violation of petitioner's Fifth Amendment right to Equal Protection. Petitioner in challenging the constitutionality of Title 18 U.S.C. § 4251(a)(4) has relied almost entirely on *Watson* vs. *United States*, 439 F.2d 442, 457, (D.C. Cir., 1970). Petitioner's reliance on *Watson, supra*, is misplaced. The difference between *Watson, supra* and the instant case is manifest.

Petitioner at PB2-3:31-32, 1-5, in citing *Watson, supra*, as authority omitted the following language from that portion of the *Watson, supra*, opinion.

> "Certainly when those two prior convictions are possible upon a mere showing by the Government of an addict in possession, we think the discrimination between the two classes of addicts is constitutionally unacceptable.

Petitioner had previously been convicted of burglary in 1958; of burglary and possession of a firearm by an ex-felon in 1960; and of forgery in 1969. Those convictions required far more than "a mere showing of an addict in possession. . .",

The *Watson* court reviewed the legislative history of NARA and stated:

> "The Senate and House versions of the Act differed on this exclusion from eligibility of those having two prior felony convictions, with the Senate enactment having no such provision. There were many expressions on the Senate floor as to the undesirability of excluding from the rehabilitative reach of the bill the large class of addicts who would have two prior convictions. The House bill prevailed on this point in conference. The conference report says only that the Senate conferees "felt it reasonable to exclude hardened offenders with serious criminal records. * * *"
>
> Both House and Senate were initially in accord on the exclusion of an offender convicted of a crime of violence. The two-prior-felony exclusion is not, however, limited to convictions for crimes involving violence. Thus, an addict having two prior felony convictions for securities fraud would not be eligible for disposition under the Act. When this provision was criticized on the House floor as likely to "exclude from coverage precisely those addicts who most need medical treatment and rehabilitation services," a defender, who later served on the conference committee, said that the Act was designed to help "the narcotic addict who is secondarily guilty of some sort of minor or nonviolent offense."
>
> (Emphasis supplied.) Upon this rationale, it appears utterly illogical, in terms of the Act's purposes, not to restrict, at the least, the exclusion to prior crimes involving violence.
>
> (439 F. 2d at 456 PN 19).

It is quite clear that *Watson* is meant to be limited to the particular facts of that case. Petitioner's prior felony convictions were not for narcotic offenses. Watson stood convicted of a violation of the Harrison Narcotic Act, Title 26 U.S.C. § 2553 *et seq* and his priors were convictions under the same statute.

If Congress has determined that certain offenders should not be mixed with narcotics addicts who have not committed two or more prior felony convictions so that the latter maybe more readily rehabilitated, then it cannot be said that Congress has acted arbitrarily.

On the basis of the foregoing, we respectfully submit that the petition be denied.

Dated: December 10, 1971.

Respectfully submitted,

JAMES L. BROWNING, JR.
United States Attorney
/s/ James L. Hazard
Assistant United States Attorney

[Certificate of Service by Mail (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-71 1985—RFP

[Filed Feb. 3, 1972, C. C. Evensen, Clerk]

ROBERT E. MARSHALL, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS

ORDER

Pursuant to 28 U.S.C. § 2255, petitioner has asked that his sentence be vacated. Petitioner is currently serving a ten year sentence imposed by this Court for violation of 18 U.S.C. § 2113(a), entering a bank with the intent to commit a felony.

Petitioner claims that he should have been sentenced as a drug addict pursuant to the narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. §§ 4251-53, despite the fact that the statute excludes from eligibility "an offender who has been convicted of a felony on two or more occasions." 18 U.S.C. § 4251(f)(4). At the time he was sentenced, petitioner had previously been convicted of at least one felony.

Essentially, petitioner's claim is that it violates the Fifth Amendment due process clause for the Narcotic Addict Rehabilitation Act to distinguish between addicts who have prior felony convictions and those who do not. In *Watson* v. *United States*, 439 F.2d 442 (D.C. Cir. 1970), the court did find such a distinction arbitrary where the prior felony convictions were for possession of narcotics. In the instance case, however, petitioner's prior convictions were for burglary, forgery, and possession of a firearm. And while it is at least arguable that the reasoning of *Watson* should be extended to any prior felony convictions resulting directly from the defendant's drug addiction, petitioner's appointed counsel in the instant case has not shown that he may be able

to prove such a direct connection between petitioner's addiction and his criminal activities.

Accordingly, this Court finds that Congress did not act arbitrarily in arranging to rehabilitate convicted drug addicts in a setting apart from convicts with histories of prior felony convictions. And petitioner's motion to vacate his sentence is hereby DENIED.

Dated: Feb. 3, 1972.

/s/ Robert F. Peckham
United States District Judge

JAMES F. HEWITT
Federal Public Defender

FRANK R. UBHAUS
Assistant Federal Public Defender

450 Golden Gate Avenue
San Francisco, California
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-71-1985

ROBERT E. MARSHALL, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENT

NOTICE OF MOTION AND MOTION TO VACATE ORDER AND TO REOPEN HEARING

TO: The United States of America, Respondent, and James L. Browning, Jr., Attorney for Respondent.

PLEASE TAKE NOTICE that on February 18, 1972, at the hour of 10:00 a.m., or as soon thereafter as counsel can be heard, Robert E. Marshall, petitioner above named, will move the Honorable Robert F. Peckham, United States District Court Judge for the Northern District of California for an order vacating the order of February 3, 1972, denying petitioner's application under Title 28 U.S.C. § 2255, and for an order reopening the hearing on petitioner's application.

This motion is made on the ground that testimony of Robert E. Marshall and others will be necessary to establish the connection between the petitioner's prior criminal record and his narcotic addiction.

This motion is based on the attached affidavit of Frank R. Ubhaus, counsel for petitioner, the files and records

in this case and any further matter which may appear at the hearing on this motion.

DATED: February 9, 1972

Respectfully submitted,

JAMES F. HEWITT
Federal Public Defender
/s/ Frank R. Ubhaus
Assistant Federal Public Defender

JAMES F. HEWITT
Federal Public Defender
FRANK R. UBHAUS
Assistant Federal Public Defender
450 Golden Gate Avenue
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-71-1985

ROBERT E. MARSHALL, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENT

AFFIDAVIT OF FRANK R. UBHAUS

I, Frank R. Ubhaus, being duly deposed and sworn, declare the following:

1. That I represent Robert E. Marshall, petitioner above named.
2. That I have received a copy of the Court's Order in the above entitled action denying petitioner's application for relief under the provisions of Title 28 U.S.C. 2255.
3. That the Court's Order appears to deny the petition primarily on the ground that the petitioner's counsel "has not shown that he may be able to prove such a direct connection between petitioner's addiction and his criminal activities."
4. That I believe such a connection exists, and further that, at the hearing on this application, I requested an opportunity to bring the petitioner to San Francisco to testify regarding his narcoties addition; this request was not granted.
5. That testimony of this petitioner and possibly other witnesses will be necessary to demonstrate to the Court

the nexus between the petitioner's prior criminal record and his narcotic addiction.

6. That I make this affidavit in support of the Motion To Vacate And To Reopen The Hearing in this matter and for the purpose of presenting to the Court sufficient evidence to establish the nexus referred to in Paragraph 5, supra, and in the Court's Order.

DATED: February 9, 1972

/s/ Frank R. Ubhaus

Subscribed to and sworn to before me this 9th day of February 1972.

C. C. EVENSON
Clerk of the United States District Court

/s/ S. Douglas
Deputy Clerk

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-1479

[Filed Nov. 15, 1972, Dennis R. Mathews, Clerk, U. S. Court of Appeals]

ROBERT EDWARD MARSHALL, PLAINTIFF-APPELLANT

vs.

J. J. PARKER, Warden, UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Before: BARNES and TRASK, Circuit Judges, and BATTIN, District Judge.*

TRASK, Circuit Judge:

On February 4, 1971, Robert Marshall, appellant, was sentenced to ten years imprisonment following his plea of guilty of the offense of entering a bank with the intent to commit a felony in violation of 18 U.S.C. § 2113 (a). There was a recommendation that he receive treatment for his narcotic addiction. On October 15, 1971, he filed a petition *in propria persona* pursuant to 28 U.S.C. § 2255 to vacate that sentence as illegal.[1] Following appointment of counsel and oral argument on the petition it was denied on February 3, 1972, and this appeal is from the order of denial.

It was the contention of appellant in his Section 2255 petition that the sentencing court erroneously denied him consideration for treatment as a narcotic addict under

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* Hon. James F. Battin, United States District Judge, for the District of Montana, sitting by designation.

[1] We treat the Section 2255 petition as a motion for correction of an illegal sentence under Rule 35, Fed. R. Crim. P., *Brooks* v. *United States*, 457 F.2d 970 (9th Cir. 1972).

Title II of the Narcotic Addict Rehabilitation Act of 1966 (NARA), 18 U.S.C. §§ 4251-4255.[2] The order of the trial court denying the petition apparently relied on 18 U.S.C. § 4251(f)(4) which excludes from the coverage of the Act, ". . . an offender who has been convicted of a felony on two or more occasions." The court noted in its order that appellant had a record of prior convictions for burglary, forgery, and possession of a firearm.

Before the trial court and here, appellant relies upon decisions of the Court of Appeals of the District of Columbia which hold that the two prior felony exclusion of Section 4251(f)(4) is unconstitutional under the equal protection concept embodied in the Due Process Clause of the Fifth Amendment. *Watson* v. *United States*, 439 F.2d 442, 457 (D.C. Cir. 1970), and the cases which have followed it,[3] *United States* v. *Williams*, 442 F.2d 738 (D.C. Cir. 1970); and *Chicquelo* v. *United States*, 452 F. 2d 1316 (D.C. Cir. 1971). Because the two prior felony convictions in *Watson* were for violations of narcotics laws there was some conjecture that the rationale of that case was limited to like facts. It now appears that such is not the case, *United States* v. *Hamilton*, 462 F.2d 1190 (D.C. Cir. 1972), and that any two prior felony convictions are within the intendment of the *Watson* rule of unconstitutional exclusion.[4]

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[2] Title II applies to those classified under the Act as "eligible offenders" constituting addicts who have been convicted of an offense against the United States and are otherwise eligible for treatment looking to rehabilitation in lieu of punishment for crime. See n.6 *infra*.

[3] The problem posed by *Robinson* v. *California*, 370 U.S. 660 (1962), of conviction and punishment because of the "status" of being an addict is not presented here either directly on the record or tangentially as the *Watson* court considered it. Appellant relies principally upon Part IV of the *Watson* opinion. 439 F.2d at 454.

[4] In *Hamilton* the court assumes three possible justifications for the two prior felony disqualification and rejects each under the equal protection argument. The first assumption rejected is that the two prior felony disqualification eliminates those who are not likely prospects for rehabilitiation. This rejection is based upon *Watson*. That case, however, dismisses the classification because

We do not agree that Congress in enacting Title II of the NARA may not constitutionally limit the persons eligible to receive its benefits as it has seen fit to do.

Let us first consider the Act itself. Title I,[5] 28 U.S.C. §§ 2901-2906, provides for civil commitment and rehabilitation of narcotic addicts charged with an offense but prior to prosecution. Under it if the district court believes that an eligible person is an addict, the court may advise him that the prosecution of the criminal charge will be held in abeyance if he elects to submit to an immediate examination to determine whether he is an addict *and is likely to be rehabilitated through treatment.* If the election is made and he is found qualified, he will be civilly committed to the Surgeon General for treatment. If the treatment is successful over a period of three years the criminal charge will be dismissed, but if not, prosecution will be resumed. Provision is also made for supervisory aftercare.

Title II, 18 U.S.C. §§ 4251-4255, with which we are here concerned, encompasses treatment of an individual who has been convicted of an offense against the United States. If the court believes that an eligible offender[6]

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it was not contemplated by a Presidential Commission Report and because the disqualification is at odds with what the court understands Congressional purpose to be. 439 F.2d at 456. While not disagreeing that the purpose of the Act is rehabilitation, we are unable to discern Congress' purpose with respect to the two prior felony exclusion as being any different than what Congress plainly says it to be. Nor does this classification defeat the Congressional purpose. For the same reason we reject any distinction based upon post 1966 felony convictions as opposed to prior 1966 felony convictions.

[5] Public Law 89-793; 80 Stat. 1438 should be consulted for an overview since it is the only source where all three titles of the NARA are found together.

[6] 18 U.S.C. § 4251(f) states in pertinent part:

"(f) 'Eligible offender' means any individual who is convicted of an offense against the United States, but does not include—

"(1) an offender who is convicted of a crime of violence.

"(2) an offender who is convicted of unlawfully im-

under that title is an addict, the court may place him in the custody of the Attorney General for an examination to determine whether he is an addict and is likely to be rehabilitated through treatment. If so, he may be committed to the Attorney General for treatment for an indeterminate sentence not to exceed ten years, or the maximum sentence that could otherwise be imposed.

Title III, 42 U.S.C. §§ 3411-3426, provides for civil commitment of persons not charged with any criminal offense. This procedure is initiated by an addict who desires treatment, or by a related individual. A petition may be filed in the United States District Court to commit such person to the Surgeon General for treatment in a hospital of the Public Health Service. Again, it must be determined that he is a narcotic addict "*who is likely to be rehabilitated through treatment.*"

In Title III of the Act, 42 U.S.C. §§ 3411-3426, we find no exclusion based upon prior conviction. 42 U.S.C. § 3412 provides: "(a) Except as otherwise provided in section 3421 of this title, whenever *any* narcotic addict desires to obtain treatment for his addiction . . ." a petition may be filed. (Emphasis supplied).

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porting or selling or conspiring to import or sell a narcotic drug, unless the court determines that such sale was for the primary purpose of enabling the offender to obtain a narcotic drug which he requires for his personal use because of his addiction to such drug.

"(3) an offender against whom there is pending a prior charge of a felony which has not been finally determined or who is on probation or whose sentence following conviction on such a charge, including any time on parole or mandatory release, has not been fully served: *Provided*, That an offender on probation, parole, or mandatory release shall be included if the authority authorized to require his return to custody consents to his commitment.

"(4) an offender who has been convicted of a felony on two or more prior occasions.

"(5) an offender who has been committed under title I of the Narcotic Addict Rehabilitation Act of 1966, under this chapter, under the District of Columbia Code, or under any State proceeding because of narcotic addiction on three or more occasions." (Emphasis in original).

42 U.S.C. § 3421 then states: "The provisions of this subchapter shall not be applicable with respect to any person against whom there is pending a criminal charge, whether by indictment or by information, which has not been fully determined or who is on probation or whose sentence following conviction on such a charge, including any time on parole or mandatory release, has not been fully served, except that such provision shall be applicable to any such person on probation, parole, or mandatory release if the authority authorized to require his return to custody consents to his commitment."

It appears from these statutory sections that a narcotic addict with two or more prior felony convictions would not be excluded from treatment of his addiction under Title III of the NARA, unless there was a criminal charge pending against him at the time he petitioned. This is evidence that Congress did not intend to totally exclude persons within the class of twice-prior-convicted felons from rehabilitation treatment, but rather, in light of the overall purpose of rehabilitation, Congress wanted to assure that the program was entered into with a sincere, good-faith desire for treatment and not with a motive merely to escape criminal punishment.

Thus, in each of the three titles, *i.e.*, Title I applying to addicts charged with a criminal offense, Title II applying to those convicted, but not yet sentenced and, Title III applying to those not charged with a criminal offense, the reach of the Act is to those who are not only addicts but also "*are likely to be rehabilitated through treatment.*" This is consistent with the declared policy of Congress in enacting this legislation that:

> "It is the policy of the Congress that certain persons charged with or convicted of violating Federal criminal laws, who are determined to be addicted to narcotic drugs, *and likely to be rehabilitated through treatment*, should, . . . be civilly committed for confinement and treatment designed to effect their restoration to health, and return to society as useful members.

> "It is the further policy of the Congress that certain persons addicted to narcotic drugs who are not charged with the commission of any offense should be afforded the opportunity, through civil commitment, for treatment, in order that they may be rehabilitated and returned to society as useful members and in order that society may be protected more effectively from crime and delinquency which result from narcotic addiction." 42 U.S.C. § 3401; 1966 U.S. Code Cong. & Adm. News at 1670. (Emphasis supplied).

The Act treats each of these three categories a little differently as to the length of treatment and procedures for obtaining it, but in each it applies to those addicts likely to be rehabilitated. Congress could, it is submitted, have broadened the scope of the Act to addicts "who by any possibility" might be rehabilitated through treatment, and pursuant to that policy have eliminated all or almost all exclusions to eligibility. It did not see fit to do so although the legislative history indicates that it had the technical advice and resources of the Attorney General of the United States, the Surgeon General of the Public Health Service, the Director of the Bureau of Prisons of the Department of Justice, and the enforcement officials of the Secretary of the Treasury, in drafting the legislation. It may be fairly presumed, therefore, that the classifications as to eligibility were both considered and felt to be logically suited to the purposes which Congress sought to obtain by the enactment.

Dunn v. *Blumstein*, 405 U.S. 330 (1972), tells us that:

> "To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." 405 U.S. at 335.

It is clear that standards used for the purpose of evaluating classifications and justifications for them vary in accordance with the interests affected. 405 U.S. at 335,

n.6. In *Dunn* v. *Blumstein*, *supra*, where the fundamental right to vote was granted to some citizens and denied to others, the Court was required to determine whether the exclusions were necessary to promote a "compelling" state interest. 405 U.S. at 337. *See also*, *Shapiro* v. *Thompson*, 394 U.S. 618, 629, 631 (1969).

Similar concern becomes necessary where distinctions are based upon wealth or race. *McDonald* v. *Board of Education*, 394 U.S. 802 (1969); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966); *Douglas* v. *California*, 372 U.S. 353 (1963).

Here there is no suspect classification based upon wealth or race, nor can we believe that one who becomes addicted to narcotics has a "fundamental right" to rehabilitation at public expense. That being true we consider the constitutional question from the standpoint of the normal standard used in determining the validity of equal protection claims. Thus reasonable classifications of persons may be made and each class dealt with differently if there is some relevance to the basic purpose for which the classification is made. *Baxstrom* v. *Harold*, 383 U.S. 107 (1966). As the Court said in *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955):

> "Evils in the same field may be of different dimensions and proportions, requiring different remedies. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . . The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

Accord, *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972).

NARA has as its basic purpose the treatment of narcotic addicts who are likely to be rehabilitated through that treatment.[7] Standards of eligibility may well have

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[7] "The committee has carefully considered this legislation and in recommending it finds that it provides the flexibility to enable Federal authorities to treat the unfortunate addict who is

been developed by the experts in the field with an eye toward restricting eligibility in the beginning to those most likely to be rehabilitated and who would appear to bring to the program the greatest promise for its success, consistent with time, money, trained personnel and facilities which the Congress believed were available for it. For these reasons (or others) the Congress might well have established a policy to exclude, at least at the start, those whose known criminal careers made them undue risks for rehabilitation, and undue risks to the success of the program and to others in it.

Opinions might differ as to where the lines should be drawn. Some might raise the limits of eligibility by admitting those with a record of only one prior conviction for a crime of violence and raising the exclusion based on prior felonies from two to five and eliminating prior narcotics counts from the standard. Congress chose, for reasons which we cannot determine to be arbitrary, to establish the lines of eligibility where we now find them. Here the Congress is not depriving citizens of rights which they have always held and rights which are fundamental to them as members of our society. The court in *Watson* would simply extend the program farther. So might we, were we acting in a legislative capacity. As noted by the Court in *Jefferson* v. *Hackney*, *supra*:

---

capable of rehabilitation to render assistance in a manner which will enable him to extricate himself from an otherwise hopeless and repititious pattern of addiction and crime. The procedures provided by the bill in titles I, II, and III, do not essentially change the authority being exercised by law enforcement officials or the courts in dealing with persons charged with criminal offenses or convicted of such offenses. Rather the bill provides alternatives which provide a needed flexibility in the law. The practical effect of the implementation of the law provided for in the bill, is that strict punishment can be meted out where required to the hardened criminal, while justice can be tempered with judgment and fairness in those cases where it is to the best interest of society and the individual that such a course be followed." H.R. Rep. No. 1486, 89th Cong., 2d Sess.; 1966 U.S. Code Cong. & Adm. News at 4250.

> "This Court emphasized only recently, in *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970), that in 'the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.' A legislature may address a problem 'one step at a time,' or even 'select one phase of one field and apply a remedy there neglecting the others.' *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955). So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket."

We cannot find in the context of this Act and its standards of eligibility anything departing from the rational or any discrimination which may be considered "invidious." Judgments may differ, but considered differences of opinion as to proper bounds of legislative action do not amount to irrational conduct. As Justice Black said in concurring in *Powell* v. *Texas*, 392 U.S. 514, 539-40 (1968), where the Court labored over the impossible complexities of the criminal law as applied to alcoholism:

> "Even the medical authorities stress the need for continued experimentation with a variety of approaches. I cannot say that the States should be totally barred from one avenue of experimentation, the criminal process, in attempting to find a means to cope with this difficult social problem. From what I have been able to learn about the subject, it seems to me that the present use of criminal sanctions might possibly be unwise, but I am by no means convinced that *any* use of criminal sanctions would inevitably be unwise or, above all, that I am qualified in this area to know what is legislatively wise and what is legislatively unwise." (Emphasis in original).

The judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-1479

ROBERT EDWARD MARSHALL, PLAINTIFF-APPELLANT

vs.

J. J. PARKER, Warden, UNITED STATES OF AMERICA,
DEFENDANTS-APPELLEES

JUDGMENT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[SEAL]

A TRUE COPY
ATTEST MAY 3, 1973

By /s/ Raymond D. Hewitt
Deputy

Filed and entered November 15, 1972

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-1479

[Filed, Dec. 13, 1972, Dennis R. Mathews, Clerk, U.S. Court of Appeals]

ROBERT EDWARD MARSHALL, PLAINTIFF-APPELLANT

vs.

J. J. PARKER, Warden, UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES

ORDER

It is ordered that the following footnote be added to the opinion in the above-entitled case at page 6, line 12 from the bottom of the page, following the words "public expense":

> We recognize that there is a constitutional right to treatment for persons involuntarily committed to a public hospital where Congress has provided the means to effectuate this treatment. *Rouse* v. *Cameron*, 373 F.2d 451 (D.C.Cir. 1966). We also note that where an institution is providing a treatment program, one held in noncriminal custody may not be denied the right to treatment. *Martarella* v. *Kelley*, 41 U.S.L.W. 2230 (S.D.N.Y. Oct. 16, 1972).

This order is not to be officially published.

SUPREME COURT OF THE UNITED STATES

No. 72-5881

ROBERT EDWARD MARSHALL, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 26, 1973

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JUN 14 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5881

ROBERT EDWARD MARSHALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5881

ROBERT EDWARD MARSHALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (Appendix, 18) is reported at 470 F.2d 34.

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1972, and an order amending the opinion

was filed on December 13, 1972 (Appendix 28). The petition for writ of certiorari was filed on December 13, 1972, and was granted on February 26, 1973. Jurisdiction of this Court is based upon 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the provisions of Title II of the Narcotic Addict Rehabilitation Act of 1966, Title 18, United States Code, §4251(f)(4), constitute a denial of equal protection by excluding from treatment those individuals who have suffered two or more prior felony convictions.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATUTE INVOLVED

Title II of the Narcotic Addict Rehabilitation Act of 1966, P.L. 89-793, 80 Stat. 1438, 18 United States Code, §§4251-4255, provides that:

TITLE II–SENTENCING TO COMMITMENT FOR TREATMENT

Sec. 201. Title 18 of the United States Code is amended by adding after chapter 313 thereof the following new chapter:

"CHAPTER 314–NARCOTIC ADDICTS

"Sec.
"4251. Definitions.
"4252. Examination.
"4253. Commitment.
"4254. Conditional release.
"4255. Supervision in the community.

"§4251. Definitions

"As used in this chapter–

"(a) 'Addict' means any individual who habitually uses any narcotic drug as defined by section 4731 of the Internal Revenue Code of 1954, as amended, so as to endanger the public morals, health, safety, or welfare, or who is or has been so far addicted to the use of such narcotic drugs as to have lost the power of self-control with reference to his addiction.

"(b) 'Crime of violence' includes voluntary manslaughter, murder, rape, mayhem, kidnaping, robbery, burglary or housebreaking in the nighttime, extortion accompanied by threats of violence, assault with a dangerous weapon or assault with intent to commit any offense punishable by imprisonment for more than one year, arson punishable as a felony, or any attempt or conspiracy to commit any of the foregoing offenses.

"(c) 'Treatment' includes confinement and treatment in an institution and under supervised aftercare in the community and includes, but is not limited to, medical, educational, social, psychological, and vocational services, corrective and preventive guidance and training, and other rehabilitative services designed to protect the public and benefit the addict by correcting his antisocial tendencies and ending his dependence on addicting drugs and his susceptibility to addiction.

"(d) 'Felony' includes any offense in violation of a law of the United States classified as a felony under section 1 of title 18 of the United States Code, and further includes any offense in violation of a law of any State, any possession or territory of the United States, the District of Columbia, the Canal Zone, or the Commonwealth of Puerto Rico, which at the time of the offense was classified as a

felony by the law of the place where that offense was committed.

"(e) 'Conviction' and 'convicted' mean the final judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere, and do not include a final judgment which has been expunged by pardon, reversed, set aside, or otherwise rendered nugatory.

"(f) 'Eligible offender' means any individual who is convicted of an offense against the United States, but does not include–

"(1) an offender who is convicted of a crime of violence.

"(2) an offender who is convicted of unlawfully importing or selling or conspiring to import or sell a narcotic drug, unless the court determines that such sale was for the primary purpose of enabling the offender to obtain a narcotic drug which he requires for his personal use because of his addiction to such drug.

"(3) an offender against whom there is pending a prior charge of a felony which has not been finally determined or who is on probation or whose sentence following conviction on such a charge, including any time on parole or mandatory release, has not been fully served: *Provided,* That an offender on probation, parole, or mandatory release shall be included if the authority authorized to require his return to custody consents to his commitment.

"(4) an offender who has been convicted of a felony on two or more prior occasions.

"(5) an offender who has been committed under title I of the Narcotic Addict Rehabilitation Act of 1966, under this chapter, under the District of Columbia Code, or under any State proceeding because of narcotic addiction on three or more occasions.

"§4252. Examination

"If the court believes that an eligible offender is an addict, it may place him in the custody of the Attorney General for an examination to determine whether he is an addict and is likely to be rehabilitated through treatment. The Attorney General shall report to the court within thirty days; or any additional period granted by the court, the results of such examination and make any recommendations he deems desirable. An offender shall receive full credit toward the service of his sentence for any time spent in custody for an examination.

"§4253. Commitment.

"(a) Following the examination provided for in section 4252, if the court determines that an eligible offender is an addict and is likely to be rehabilitated through treatment, it shall commit him to the custody of the Attorney General for treatment under this chapter, except that no offender shall be committed under this chapter if the Attorney General certifies that adequate facilities or personnel for treatment are unavailable. Such commitment shall be for an indeterminate period of time not to exceed ten years, but in no event shall it exceed the maximum sentence that could otherwise have been imposed.

"(b) If, following the examination provided for in section 4252, the court determines that an eligible offender is not an addict, or is an addict not likely to be rehabilitated through treatment, it shall impose such other sentence as may be authorized or required by law.

"§4254. Conditional release

"An offender committed under section 4253(a) may not be conditionally released until he has been treated for six months following such commitment in an institution maintained or approved by the

Attorney General for treatment. The Attorney General may then or at any time thereafter report to the Board of Parole whether the offender should be conditionally released under supervision. After receipt of the Attorney General's report, and certification from the Surgeon General of the Public Health Service that the offender has made sufficient progress to warrant his conditional release under supervision, the Board may in its discretion order such a release. In determining suitability for release, the Board may make any investigation it deems necessary. If the Board does not conditionally release the offender, or if a conditional release is revoked, the Board may thereafter grant a release on receipt of a further report from the Attorney General.

"§4255. Supervision in the community

"An offender who has been conditionally released shall be under the jurisdiction of the Board as if on parole under the established rules of the Board and shall remain, while conditionally released, in the legal custody of the Attorney General. The Attorney General may contract with any appropriate public or private agency or any person for supervisory aftercare of a conditionally released offender. Upon receiving information that such an offender has violated his conditional release, the Board, or a member thereof, may issue and cause to be executed a warrant for his apprehension and return to custody. Upon return to custody, the offender shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board, after which the Board may revoke the order of conditional release."

STATEMENT OF THE CASE

On February 4, 1971, petitioner was sentenced to the custody of the Attorney General for a period of ten (10) years pursuant to the provisions of Title 18 U.S.C. §4208(a)(2), following his plea of guilty to a charge of entering a bank with intent to commit a larceny in violation of Title 18 U.S.C. §2113(a). The District Court recommended that petitioner receive treatment for his narcotic addiction.

At the time of judgment and sentence, petitioner requested that the Court consider him for treatment as a narcotic addict under Title II of the Narcotic Addict Rehabilitation Act of 1966, Title 18 U.S.C. §§4251-4255. The District Court, however, indicated that the two prior felony exclusion contained in Title 18 U.S.C. §4251(f)(4) precluded any consideration of petitioner for treatment under Title II of the Narcotic Addict Rehabilitation Act.[1]

Petitioner has a record of prior convictions for burglary, forgery, and possession of a firearm. The burglary and the firearms possession occurred prior to November 8, 1966, the effective date of the Narcotic Addict Rehabilitation Act.

On October 15, 1971, petitioner filed a petition pursuant to Title 28 U.S.C. §2255 to vacate the sentence imposed as illegal.[2] The petition was denied on February 3, 1972, and an appeal was taken from that order. On

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[1] Section 4251(f)(4) of Title 18 U.S.C. excludes from the coverage of the Act, "... an offender who has been convicted of a felony on two or more occasions."

[2] The Court of Appeals considered the petition as a motion to correct an illegal sentence under Rule 35, Federal Rules of Criminal Procedure.

November 15, 1972, the United States Court of Appeals for the Ninth Circuit affirmed the order of the District Court (Opinion, Appendix 18).

On appeal, and before the District Court, petitioner urged that the exclusion contained in Title II of the Narcotic Addict Rehabilitation Act, 18 U.S.C. §4251(f)(4), violated the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment to the United States Constitution.

ARGUMENT

I.

THE HISTORICAL BACKGROUND OF THE NARCOTIC ADDICT REHABILITATION ACT OF 1966

In 1966, Congress enacted the Narcotic Addict Rehabilitation Act, P.L. 89-793, 80 Stat. 1438 (hereinafter NARA), a major revision of the federal court procedures for dealing with drug addicted individuals.

Title I of the Act (now 28 U.S.C. §§2901-2906), provides for civil commitment and rehabilitation of narcotic addicts *charged* with an offense but prior to conviction. Under Title I, if the district court believes that an eligible offender is an addict, the court may advise him that the prosecution of the criminal charge will be held in abeyance if he elects to submit to an immediate examination to determine whether he is an addict and is likely to be rehabilitated through treatment. If the election is made and he is found qualified, he will be civilly committed to the Surgeon General for treatment. If the treatment is successful, the criminal charge will be dismissed. If not successful, prosecution will be resumed. Provision is also made for supervisory aftercare.

Title II of the Act, now 18 U.S.C. §§4251-4255, with which the instant case is concerned, encompasses treatment of an individual who has been *convicted* of an offense against the United States. If the court believes that an eligible offender under that title is an addict, the court may place him in the custody of the Attorney General for an examination to determine whether he is an addict and is likely to be rehabilitated through treatment. If so, he may be committed to the Attorney General for treatment for an indeterminate sentence not to exceed ten years, but in no event to exceed the maximum sentence that could otherwise have been imposed.

Title III of the Act, now 42 U.S.C. §§3411-3426, provides for civil commitment of persons *not charged* with any criminal offense. This procedure is initiated by an addict who desires treatment, or by a related individual. A petition may be filed in the United States District Court to commit such person to the Surgeon General for treatment in a hospital of the Public Health Service. Again it must be determined that he is a narcotic addict "who is likely to be rehabilitated through treatment", and state facilities must be unavailable.

The first two titles contain five parallel provisions, 28 U.S.C. §2901(g)(1)-(5), 18 U.S.C. §4251(f)(1)-(5), which exclude from eligibility for treatment consideration the following classes of addict-offenders:

(1) persons currently accused or convicted under federal law of a crime of violence, 28 U.S.C. §2901(c), 18 U.S.C. §4251(b);

(2) persons currently accused or convicted under federal law of selling or importing or conspiring to sell or import a narcotic drug, except that Title II carves out of that class and makes eligible for commitment those addicts that the court finds sold "for the primary purpose of enabling the offender

to obtain a narcotic drug which he requires for his personal use because of his addiction to such drug." 18 U.S.C. §4251(f)(2);

(3) persons against whom a felony charge (other than the one under which they are being processed) is outstanding or who have not completed a prior sentence, or period of probation or parole, unless parole or probation authorities consent;

(4) persons "convicted of a felony on two or more occasions," 28 U.S.C. §2901(g)(4), 18 U.S.C. §4251(f)(4) (the provision challenged in the instant case); and

(5) persons civilly committed three times previously under any state or any specified federal program.

The term "felony" used in the third and fourth exclusions is defined as any offense classified as a felony by 18 U.S.C. §1 or by the law of the jurisdiction in which the offense was committed at the time of its commission, 28 U.S.C. §2901(e), 18 U.S.C. §4251(d). Title III contains only the third exclusion covering any criminal charge, 42 U.S.C. §3421.

The general purpose of Congress in enacting the Narcotic Addict Rehabilitation Act was, "to provide for the treatment and rehabilitation of narcotic addicts when they are charged with or convicted of offenses against the United States." H.R. Rep. No. 1486, 89th Cong., 2d Sess., (1966), 1966 U.S. Code Cong. & Admin. News 4245, 4248.

To achieve this noble purpose Congress expanded the disposition alternatives available to federal courts in criminal cases and gave the courts discretion in utilizing the new procedures. To aid the courts in making the distinction between hardened addict-criminals deserving punishment and other addict-criminals deserving consideration for treatment, Congress created the five exclusions referred to above.

> "The definition of 'eligible individual' as set forth in the bill insures that the persons considered as candidates for civil commitment will not include criminals charged with violent crimes or be those whose records disclose a history of serious crimes." *United States v. Bishop*, 469 F.2d 1337 at 1340 n. 4 (1st Cir. 1972).

The two prior felony exclusion was apparently the mechanism intended to insure punishment for those addict offenders with a "history of serious crimes." *Bishop, supra* at 1341 n. 5.

As the Court in *Bishop* noted, Congress intended that, except for those in the excluded categories, *all* federal offenders should be eligible for treatment.

II.

THE PROVISIONS OF TITLE II OF THE NARCOTIC ADDICT REHABILITATION ACT OF 1966 DEPRIVE PETITIONER OF DUE PROCESS OF LAW

Under Title 18 U.S.C. §4251(f)(4), an offender who has been convicted of a felony on two or more prior occasions is excluded from the benefits of treatment available to other addict offenders convicted of federal offenses.

The purpose of NARA was the treatment and rehabilitation of addicts, like petitioner, charged with or convicted of federal offenses. The exclusion found in Section 4251(f)(4) of an offender who has suffered two or more prior felony convictions operates to defeat that purpose in an unconstitutional fashion by mandating the disqualification of an otherwise eligible offender regardless of the likelihood of rehabilitation, and regardless of the type of prior conviction.

Petitioner recognizes that equal protection does not require that all persons be dealt with identically. However, a basic requirement of equal protection, whether on the state or federal level, is that any distinction made between persons otherwise similarly situated (here narcotic addicts likely to be rehabilitated by treatment), have some relevance to the purpose for which the distinction is established. *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966); *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966); see also *James v. Strange*, 407 U.S. 128 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972).

The two prior felony exclusion has been considered and found unconstitutional by the United States Court of Appeals for the District of Columbia Circuit, *Watson v. United States*, 439 F.2d 442, 454-457 (D.C. Cir. 1970); *United States v. Williams*, 442 F.2d 738, 742 (D.C. Cir. 1970); *Chicquelo v. United States*, 452 F.2d 1310 (D.C. Cir. 1971); *United States v. Hamilton*, 462 F.2d 1190 (D.C. Cir. 1972); and by the United States Court of Appeals for the First Circuit, *United States v. Bishop*, 469 F.2d 1337 (1st Cir. 1972). But see contra *Macias v. United States*, 464 F.2d 1292 (5th Cir. 1972), petition for a writ of certiorari pending, No. 72-5539.

The Court of Appeals in *Hamilton, supra*, stressed that the disqualification of any offender who might be found to be otherwise amenable to treatment is at odds with the central purpose of rehabilitation and would therefore, require justification by reference to an independent purpose. The Court assumed three possible independent purposes and rejected each of them. The initial assumption rejected is that the two prior felony exclusion eliminates those who are not likely prospects for rehabilitation. *Hamilton, supra*, at 456.

In *United States v. Bishop, supra* at 1343, the Court, in reading §4251(f)(4) in conjunction with other parts of

the Act, found a "whole series of anomalies, in the root sense of inequalities, indicating that the disqualification lacks 'relevance to the purpose for which the classification is made.' "

The Court compared §4251(f)(4) with the exclusion of narcotic sellers contained in §4251(f)(2). Under (f)(2) a convicted seller is eligible for treatment if he can show that the sale was made primarily to support his own addiction, even if he had previously sold narcotics for profit. The Court noted that it was this dealer for profit that Congress most strongly desired excluded. Yet under (f)(4), the same individual cannot get treatment if he had been convicted of two prior narcotics sales, even though all sales were primarily to satisfy his addiction.

Such anomalies, the Court concluded, cannot be explained as a by-product of the rule employed by Congress to insure exclusion of all hardened criminals. The same rule which *excludes* hardened offenders with two prior felony convictions *includes* all hardened offenders with one prior conviction, regardless of the nature of the offense. Nor can it be argued that such classification spares courts the time needed to determine addict-relatedness. The *Bishop* Court noted that courts are called upon repeatedly to spend time examining the validity of prior convictions based upon stale evidence. Given the unanimous testimony before Congress that almost all addict-committed crimes spring from the addiction, and the uncontradicted testimony that addicts usually are arrested and convicted of several offenses in the first few years of addiction, the Court concluded that it was contradictory to conserve judicial resources as to one prior felony so as to err on the side of *including* all those deserving treatment and use the same justification as to two felonies so as to err on the side of *excluding* undesirables. *United States v. Bishop, supra,* at 1344.

The Court in *Bishop* found similar inconsistencies in comparing §4251(f)(4) with §4251(f)(1), the disqualification for those convicted of a crime of violence, as well as with §4251(d), the felony definition provision. *United States v. Bishop, supra* at 1344-45.

The Court also compared §4251(f)(4) with Title III of NARA, 42 U.S.C. §§3411-3426, the provisions permitting any narcotic addict or related individual to petition for civil treatment commitment. Since the Court of Appeals for the Ninth Circuit places great emphasis in the instant case on the existence of Title III, it is worthwhile to note the conclusion drawn by the First Circuit from its comparison of these provisions.

Under 42 U.S.C. §3412(b), following a request for commitment by the United States Attorney, the court must only find that the petitioner is "a narcotic addict who is likely to be rehabilitated through treatment" before committing him. The only persons explicitly excluded are those against whom a criminal charge is pending or those who have not completed a sentence from a prior conviction. Thus, an individual like petitioner (who is to be sentenced for his third or more felony conviction) is not eligible for commitment under NARA II; but one who has completed his sentence for his third or more felony conviction may be committed under NARA III. The *Bishop* Court believed that the distinction could not be explained on the ground that the latter individual, under Title III, is acting wholly voluntarily in requesting commitment. In the first place, the Court noted, the two prior felony disqualification is aimed primarily at avoiding lenient sentencing for, or introduction into NARA centers of, hardened criminals, and is not designed to single out those unlikely to be rehabilitated, *United States v. Bishop, supra* at 1346.

Secondly, a petition for a Title III commitment may be brought not only by the addict but also by "any person with whom the alleged narcotic addict may reside or at whose house he may be." 42 U.S.C. §3411(i). The court concluded that the procedure would often be adversary, and the resulting commitment involuntary. *Bishop, supra* at 1346.

Accordingly, the First Circuit concluded that the two prior felony conviction disqualification lacked relevance to the purpose for which it was enacted. However, the Court of Appeals for the Ninth Circuit concluded in the instant case that it was permissible for Congress in enacting Title II of NARA to limit the persons eligible to receive its benefits as it has seen fit to do.

The Court, following a general discussion of NARA, concluded that the existence of a voluntary "civil type" commitment under Title III is evidence that Congress wanted to assure that the program was entered into with a sincere good-faith desire for treatment. However, as the *Bishop* opinion demonstrates, *supra,* the two prior felony exclusion is designed primarily to exclude hardened offenders and not to insure that all who are committed under NARA do so in good faith. Moreover, a commitment under Title III is not necessarily a voluntary procedure. *United States v. Bishop, supra* at 1346.

The Ninth Circuit presumed, based upon the information and advice available to Congress, that the eligibility classifications were considered and believed to be logically suited to congressional purposes. The Court recognized that the basic purpose of NARA is the treatment of addicts who are likely to be rehabilitated, and yet, without referring to specifics in the legislative history of NARA, the Court held that for reasons such as

time, money, trained personnel and facilities available, Congress may have established a policy to exclude those whose known criminal careers made them undesired risks for rehabilitation. The Court refused to act in what it termed a legislative capacity and concluded that the reasons, apparently those reasons assumed by the Court, which prompted Congress to establish the lines of eligibility as they now stand, were not arbitary.

Accordingly, the Court below held that it could not find in the context of NARA II (and the standards of eligibility) anything departing from the rational or any discrimination which may be considered "invidious". (Appendix 26).

However, as pointed out by the First Circuit in *Bishop, supra,* the purpose of the Act is rehabilitation and the primary qualification for eligibility is a "likelihood of rehabilitation". There is no rational justification for a conclusive presumption that an addict with two or more prior felony convictions is not rehabilitable. *United States v. Hamilton, supra* at 1192. This is particularly true under the provisions of NARA since Congress provided a procedure whereby the likelihood of rehabilitation must be determined by the district court, who may seek the assistance of the Attorney General in making that determination. Title 18 U.S.C. §4252.

Despite the assumptions of the Court of Appeals below, there is precious little in the legislative history of Title II of NARA which provides any real and meaningful basis for the two prior felony exclusion of §4252(f)(4). See discussion of legislative history in *Watson v. United States, supra* at 456 n. 12. Certainly Congress, if it intends to exclude certain classes of people from the benefits of its legislation, must demonstrate that there exists a rational relationship between the exclusion and

some legitimate end to be served by such exclusion. No such demonstration has been, or can be, made in support of the two prior felony exclusion of Title II of NARA.

The arbitrariness of this classification is brought out in relief when the prison type commitment provisions of Title II are compared with the civil type commitment provisions of Title I, 28 U.S.C. §2901 *et seq.* As noted above, the exclusions are virtually identical. It is arguable, and perhaps justifiable, that Congress intended to exclude from civil commitments to the Surgeon General under Title I those addict offenders who have engaged in prior criminal behavior; but it does not follow that, because of undifferentiated prior criminal behavior, those addicts should also be denied a *prison type* commitment for treatment and rehabilitation, particularly when such treatment is available to other addict offenders otherwise similarly situated.

CONCLUSION

It is respectfully submitted that the classification here involved is not reasonably related to the declared legislative purpose, and denies petitioner equal protection of the laws. The judgment of the Court below should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-5881

ROBERT EDWARD MARSHALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 18-26, 28) is reported at 470 F.2d 34.

JURISDICTION

The judgment of the court of appeals (A. 27) was entered on November 15, 1972. The petition for a writ of certiorari was filed on December 13, 1972 and was granted on February 26, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether that portion of the Narcotic Addict Rehabilitation Act of 1966 that excludes narcotic

addicts with two or more prior felony convictions from eligibility for commitment for treatment of their addiction in lieu of criminal sentencing violates the Due Process Clause of the Fifth Amendment.

STATUTES INVOLVED

Title II of the Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. 4251–4255, is set forth in Petitioner's Brief at pp. 2–6.

STATEMENT

On February 4, 1971, petitioner pleaded guilty to a charge of entering a bank with intent to commit larceny in violation of 18 U.S.C. 2113(a); he was sentenced to ten years' imprisonment. At sentencing, he requested that he be considered for treatment as a narcotic addict pursuant to Title II of the Narcotic Addict Rehabilitation Act of 1966 ("NARA"). The court, noting his record of prior convictions for burglary, forgery and possession of a firearm, held that the two prior felony exclusion set forth in 18 U.S.C. 4251(f)(4) precluded him from consideration for such commitment. It did, however, recommend that while incarcerated he receive treatment for his narcotic addiction.[1]

[1] The rehabilitative treatment afforded addicts by the Federal Bureau of Prisons is essentially the same, whether they are committed to the Bureau's custody under NARA or under ordinary criminal sentences. However, treatment begins immediately upon commitment under NARA, and the offender is eligible for conditional release on parole after six months of treatment (18 U.S.C. 4254). Addicts not committed under NARA are not placed in the rehabilitation program until about 12 to 18 months before their anticipated release, since it is important that after-

On October 15, 1971, petitioner moved under 28 U.S.C. 2255 to vacate his sentence as illegal on the grounds that the two prior felony exclusion violates the concept of equal protection of the laws embodied in the Due Process Clause of the Fifth Amendment, and that the court's refusal on the basis of that exclusion to consider him for NARA commitment was consequently improper (A. 2–5). The district court denied the motion (A. 12–13) and the court of appeals affirmed, finding no constitutional infirmity in the legislative classifications (A. 18–26).

INTRODUCTION AND SUMMARY OF ARGUMENT

In enacting the Narcotic Addict Rehabilitation Act of 1966 (P.L. 89–793, 80 Stat. 1438), Congress initiated a program to break the narcotic addiction-criminal conduct cycle through a three-pronged experimental effort. Title I of the statute (28 U.S.C. 2901–2906) provides for rehabilitative civil commitment in lieu of trial for certain consenting narcotic addicts charged with federal offenses. Title II (18 U.S.C. 4251–4255)—involved in this case—provides for committing certain narcotic addicts who have been convicted of federal offenses for treatment in lieu of any other sentence that may be au-

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care in the community follow immediately on the institutional phase of the program. Moreover, although it is estimated that approximately 5,000 federal prisoners suffer from some degree of drug dependency, the optimum capacity of the facilities operated under NARA is presently about 600. A roughly equivalent number of addicts can be treated in non-NARA facilities. Thus, although commitment under NARA assures treatment, a judicial recommendation for similar treatment at the time an ordinary criminal sentence is imposed does not.

thorized by law. Title III (42 U.S.C. 3411-3426) provides for rehabilitative civil commitment at the instance of the addict himself or a "related individual" for certain narcotic addicts who are not charged with any federal offense.

Commitment is limited to those addicts who are adjudged likely to be rehabilitated through treatment. Under Title II, if the court believes a convicted offender is an addict who is *otherwise eligible* under the Act for treatment, the court may place the offender in the custody of the Attorney General for a study to determine whether he is in fact an addict, and whether he is likely to be rehabilitated through treatment. The Attorney General reports his conclusions to the court within thirty days, or such longer period as the court permits. 18 U.S.C. 4252. If the court then determines that the offender is an addict who is likely to be rehabilitated, it commits him to the custody of the Attorney General for an indeterminate period, not to exceed either 10 years or the maximum sentence for the offense for which he was convicted, whichever is shorter. 18 U.S.C. 4253(a).[1]

[1] Under Title I, the initial judgment as to the likelihood of rehabilitation is made by the Surgeon General, after commitment for examination to the custody of either the Surgeon General or the Attorney General. 28 U.S.C. 2902(a). Under Title III, the initial judgment is made by two qualified physicians (including at least one psychiatrist) appointed by the district court. Alternatively the court in its discretion may commit the addict to the custody of the Surgeon General for the examination. 42 U.S.C. 3413. Under both of those titles, the judge makes the final decision, unless, under Title III, the addict demands a jury trial (28 U.S.C. 2902(b); 42 U.S.C. 3414(a)).

The opportunity to be considered for rehabilitative commitment is limited under all three titles. Titles I and II contain parallel definitions of eligibility (28 U.S.C. 2901(g); 18 U.S.C. 4251(f)) which exclude from consideration (1) those who are charged with (Title I) or convicted of (Title II) specifically defined crimes of violence; (2) those who are charged with (Title I) or convicted of (Title II) unlawfully selling a narcotic drug (unless, under Title II, the court determines that the primary purpose of the sale was to enable the person seeking rehabilitative commitment to obtain for his own use a narcotic drug which he required because of his addiction); (3) those against whom there are pending prior felony charges or who are under sentences which have not been fully served;[3] (4) those who have been convicted of a felony on two or more prior occasions; and (5) those who have previously been committed because of narcotic addiction under any federal or state program on three or more occasions.[4]

Petitioner contends that the fourth exclusion adopted by Congress—of persons with two or more prior felony convictions—has no rational basis, and thus that its application to preclude him from consideration for rehabilitative commitment in lieu of the penal sentence which he received constituted a violation of his Fifth Amendment due process right to the

[3] A person on probation, parole, or mandatory release may be committed if the authority empowered to order his return to custody consents to his commitment.

[4] The exclusion under Title III parallels the third exclusion in Titles I and II; it bars from consideration those against whom criminal charges are pending or who are under sentence.

equal protection of the laws. Examination of the legislative history and the scheme of the legislation itself shows that the basis for the exclusion of addicts with two prior felony convictions was the desire to assure that the benefits of the limited experimental program being established would be available to those most likely to be benefited by it—those who were primarily addicts, and only secondarily criminals. At the same time, Congress did not wish the program to be used as a means for hardened criminals to escape punishment. The two prior felony exclusion was thus adopted as one of several easily applied criteria for husbanding the limited resources allocated to the program. Since the classification, which is not inherently suspect, bears a rational relation to a legitimate legislative purpose, there is no denial of equal protection. The courts of appeals which have found such a denial have incorrectly substituted their judgment concerning the wisdom of the exclusion for that of the Congress.

ARGUMENT

THE PROVISION OF 18 U.S.C. 4251(f)(4), PRECLUDING CONSIDERATION FOR REHABILITATIVE COMMITMENT OF NARCOTICS ADDICTS WHO HAVE BEEN CONVICTED OF TWO OR MORE PRIOR FELONIES, DOES NOT OFFEND THE CONCEPT OF EQUAL PROTECTION EMBODIED IN THE FIFTH AMENDMENT DUE PROCESS CLAUSE

A. CONGRESS ENACTED THE NARCOTIC ADDICT REHABILITATION ACT COMMITMENT PROGRAM AS AN EXPERIMENTAL PILOT PROJECT FOR WHICH ONLY THOSE ADDICTS DEEMED MOST CAPABLE OF BEING REHABILITATED WOULD BE ELIGIBLE

Although relatively broad in its reach, the bill which became the Narcotic Addict Rehabilitation Act was "only a pilot project," which offered a "chance

to experiment on a very limited scale, under careful court and medical supervision." (112 Cong. Rec. 11814 [Rep. Hungate].) The Senate Committee noted that the bill "does not pretend to offer a final and total solution to the problem of treating narcotic addiction." S. Rep. No. 1667, 89th Cong., 2d Sess., at 14. Because of the experimental nature of the program, provisions were written to limit the class of persons eligible for consideration for rehabilitative commitment in lieu of criminal sentencing. As the Surgeon General explained while testifying in favor of the version of the legislation proposed by the administration, the limitations were "adopted in the interest of public safety, and in recognition of the still novel and somewhat uncharted nature of this kind of program." Hearings before Subcommittee No. 2 of the House Committee on the Judiciary, Civil Commitment and Treatment of Narcotic Addict, 89th Cong., 1st and 2d Sess., at 121.[5]

More specifically, the limitations on eligibility reflect three interrelated congressional aims: to maximize the chances for success of the initial program, to

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[5] During debate, the proposed legislation was described as a "first step" (112 Cong. Rec. 11817 [Rep. Multer], 11835 [Rep. Halpern]), a "good start" (112 Cong. Rec. 25433 [Sen. Ervin]), a "good beginning" (112 Cong. Rec. 25433 [Sen. Robert F. Kennedy of New York]), and a "considered step in the right direction" (112 Cong. Rec. 11813 [Rep. McCullouch]). Representative Celler noted that Congress was "striking out on a new path" and was "only on the threshold of the attempt to cure drug addiction" (112 Cong. Rec. 11898), and Senator Ervin stated that "[w]e do not know enough about the problem yet to legislate with finality" (112 Cong. Rec. 25433).

[6] Cited hereafter as "Hearings."

keep its costs within bounds, and to protect society by preventing the program from becoming a means by which hardened criminals could avoid penal sanctions. The federal voluntary commitment program in operation at the time NARA was being debated had a relapse rate of 75%, and even in the more successful program operated by the state of California the relapse rate was 50% (Hearings, at 125). The relative success of the California program was attributed to its emphasis on after-care and close supervision. These were to be similarly emphasized in the new federal program (S. Rep. No. 1667, *supra*, at 15).[1] Accordingly, the three titles establishing the different forms of rehabilitative commitment provide that no addict is to be committed thereunder unless adequate facilities or personnel for his treatment are available. 28 U.S.C. 2902(b); 18 U.S.C. 4253(a); 42 U.S.C. 3422.

The questions whether available resources were adequate for a successful program and, if they were not, what the potential cost of providing new facilities would be, troubled Congress throughout its consideration of the legislation. Despite the inquiries of doubting members of the House subcommittee, the Director of the Bureau of Prisons indicated that no new facilities or personnel would be required to implement the Act (Hearings, at 388, 389–391, 393). The Surgeon General testified, however, that the federal facility

[1] A number of Congressmen pointed out during debate that an unsuccessful program operated by the State of New York owed its difficulties to its lack of sufficient facilities and trained personnel. 112 Cong. Rec. 11827 (Rep. Reid of New York), 11897 (Rep. Farbstein), 28549 (Rep. Addabbo).

then used for the voluntary commitment program was already operating at essentially full capacity (Hearings, at 119), and the Prisons Director admitted that there was no way of estimating how many addicts would be committed under NARA (Hearings, at 393).

A number of Congressmen therefore urged the necessity of expanding federal facilities and appropriating adequate funds to accomplish this expansion.[8] This approach, however, was rejected. An amendment which would have added a fifteen million dollar appropriation to the bill for such an expansion was defeated, at least in part because of a reluctance to expend such a sum on an experimental program. See generally 112 Cong. Rec. 11896–11901.[9]

Congress therefore adopted the alternative approach: In order to limit expenditures and still provide extensive enough treatment to give the program a chance of success, it restricted the classes of persons who would be eligible to participate in the program. Instead of authorizing an attempt to treat all narcotics addicts who engage in criminal conduct, it established a "pilot project," which was intended to reach that group which was considered both most amenable

[8] 112 Cong. Rec. 11817 (Rep. Gallagher), 11826 (Rep. Wright), 11835–11836 (Rep. Halpern), 11894 (Rep. Bingham), 11897 (Rep. Farbstein), 11898 (Rep. Tenzer), 11901 (Rep. Gilbert).

[9] In conference, the House accepted a Senate amendment adding a fifteen million dollar appropriation for each of two fiscal years, but the purpose of the appropriation was not to provide new federal facilities, but rather to enable the Surgeon General to make grants to states, municipalities and private institutions for non-federal programs. See H. Rep. No. 2316, 89th Cong., 2d Sess., at 19–20; P.L. 89–793, Title IV, § 402, 80 Stat. 1448.

to treatment, and most deserving of the special benefits provided by the new law."[10]

The intended effect of the legislation was thus "to confine eligibility for the benefits of the legislation to addicts accused of nonviolent crimes who show good prospects for rehabilitation, while retaining strict criminal punishment for dangerous or hardened offenders, narcotics pushers, and persons with a history of failure to respond to treatment." S. Rep. No. 1667, *supra*, at 17, see also *id.* at 13.[11]

The two prior felony exclusion provided an easily administered means of implementing this intent. In the first place, there had been testimony that half of those convicted of narcotic offenses had two or more prior felony convictions while the remainder had one or none (Hearings at 381). If the same statistics were generally true of addicts convicted of non-narcotic offenses, the exclusion would approximately

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[10] Representative McClory, a member of the subcommittee which considered the bill, explained:

"[N]arcotic addiction frequently is found among the criminal element. They are first of all criminals; secondarily, they are narcotic addicts.

"Under this legislation what we are aiming to get at is the narcotic addict who is secondarily guilty of some sort of minor or nonviolent offense. When the judge feels that such an offender can be rehabilitated and his addiction treated as a disease, he will be given the advantage of civil commitment procedure under title I and title II" (112 Cong. Rec. 11813).

[11] The quoted language was used to explain the eligibility limitations contained in Title I. The explanation applies equally, however, to the limitations contained in Title II, since the categories of eligibility are the same. See S. Rep. No. 1667, *supra*, at 18.

halve the number of addicts eligible for treatment, thereby effectively husbanding the limited resources available. Moreover, a focus on whether an offender has two or more prior felony convictions provides an entirely reasonable dividing line for determining when a man is primarily an addict and secondarily a criminal and when the reverse is more likely to be true. Thus the exclusion also tended to assure that the limited resources were allocated to the group Congress had determined was particularly likely to benefit from treatment, rather than to those especially deserving traditional criminal sentencing. The two prior felony exclusion, in short, was intended, like its companion exclusions, to serve the purpose of maximizing the chances for success of the experimental pilot project, while avoiding the danger that it would be used to permit hardened offenders to escape punishment.

B. THE TWO PRIOR FELONY EXCLUSION RATIONALLY SERVES THE LEGITIMATE LEGISLATIVE PURPOSE OF EFFICIENTLY ALLOCATING THE LIMITED RESOURCES WHICH CONGRESS WAS WILLING TO COMMIT TO THE NARA PROGRAM

The congressional belief that limitations on eligibility were necessary in order to apportion the limited resources available for the proposed rehabilitation program was warranted. The Bureau of Prisons presently maintains five facilities to handle addicts committed for treatment or study under Title II of the Act.[12]

[12] These facilities are located at Milan, Michigan; Danbury, Connecticut; Terminal Island, California; Alderson, West Virginia; and Forth Worth, Texas. There are also 10 similar non-NARA facilities in which about 550 addicts from the general prison system are treated.

According to the bureau, these facilities have an optimum capacity of 600,[13] but as of April 30, 1973, the facilities were being operated at over 100% capacity.[14] Any substantial relaxation in eligibility qualifications would thus overburden facilities which are already being operated above optimum capacity. The impact of relaxing eligibility requirements cannot, moreover, be minimized by arguing that such a relaxation will increase only the number of those qualifying for consideration for treatment and not necessarily those who will actually receive treatment. The same resources—in terms of space, beds and personnel—are used for those committed for study as are used for those actually being treated.[15]

The real question presented by this case is thus whether Congress could properly conclude that addicts, upon their third conviction for a felony, constitute such doubtful and undeserving prospects for

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[13] Optimum capacity is determined to some extent by the number of psychologists, case workers, and correction counselors available at each facility. According to the Bureau of Prisons, the goal is to have one psychologist, one case worker and two correction counselors for every fifty addicts, although in the general prison system a caseload for case workers and correction counselors of 200 is considered acceptable.

[14] There were 647 addicts in the five facilities: 493 assigned for treatment and 94 for preliminary study under NARA, and 60 non-NARA addicts from the general prison system.

[15] Although offenders committed for study typically stay in the facility for only a month, as opposed to the typical stay of 14 months for treatment, the overall load imposed on the facilities by commitments for study remains fairly constant. Throughout the six months from December 1972 through May 1973, there were approximately 100 offenders undergoing study at all times.

rehabilitation that it would unduly burden the limited resources of the program to allow them to be committed even for study. This Court's prior pronouncements on the subject of equal protection demonstrate clearly that Congress could properly reach that conclusion.

1. The constitutional test to be applied becomes clear when the issue in this case is kept in mind. What the Court is called upon to review is a statute that creates new mechanisms for affording an alternative to criminal sentencing for certain persons convicted of federal felonies. In determining to whom to extend these benefits, Congress has carved out from eligibility a class of convicted felons who have previously committed at least two other felonies. Thus, the restriction relates to a statutory benefit, not a fundamental constitutional right, and the classification itself is not based on race, color, religion, national origin, political belief—or any inherently "suspect" classification.

Since the statutory judgment concerns essentially a matter of social and penal policy, "the applicable standard, in measuring the propriety of Congress' classification, is that of rational justification," rather than that of a "compelling governmental interest." *United States* v. *Kras,* 409 U.S. 434, 446. See, also, *San Antonio Independent School District* v. *Rodriguez,* No. 71–1332, decided March 21, 1973, slip op. at 29–30, 33–36. It is constitutionally sufficient that classifications which, like this one, are not inherently suspect "bear some rational relationship to a legitimate

state end"; they "will be set aside as violative of the equal protection clause only if based on reasons totally unrelated to the pursuit of that goal." *McDonald* v. *Board of Education*, 394 U.S. 802, 809; see also *McGowan* v. *Maryland*, 366 U.S. 420, 425.

These principles of judicial deference to legislative policy judgments naturally apply with equal force to review of penological determinations on how to deal with those convicted of crimes, which "require only some rational basis to sustain them." *McGinnis, Commissioner of Correction* v. *Royster*, No. 71-718, decided February 21, 1973, slip op. p. 7. A statutory "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489. Nothing in the Constitution requires a legislature to "choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge* v. *Williams*, 397 U.S. 471, 487. "Legislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331. And when a legislature elects to move in an area of social policy, "[s]o long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems * * * are not subject to a constitutional straitjacket." *Jefferson* v. *Hackney*, 406 U.S. 535, 546.

2. Under these settled principles, the eligibility limitation for NARA commitment challenged by petitioner measures up to the requirements of rationality

and fair legislative judgment. It is evident, as we have shown, that Congress decided to enact, as a "pilot project," a rehabilitative program of reasonable cost which would have fair prospects for success. The limitations on eligibility were adopted, at least in part, in order to allocate efficiently the limited resources which Congress was at that time willing to commit to the program. Petitioner's complaint is simply that what Congress proclaimed to be its "first step" was not long enough to reach him, but that complaint makes out no denial of equal protection.

In his attempt to demonstrate that the two prior felony exclusion lacks a "basis in practical experience," petitioner relies primarily upon decisions of the First Circuit in *United States* v. *Bishop*, 469 F. 2d 1337, and of the District of Columbia Circuit in *Watson* v. *United States*, 439 F. 2d 442, *United States* v. *Williams*, 442 F. 2d 738, *Chicquelo* v. *United States*, 452 F. 2d 1310, and *United States* v. *Hamilton*, 462 F. 2d 1190.[16] An examination of the grounds for decision in both circuits, however, discloses that there is no merit to their holdings of lack of rational connection between the exclusion and the purpose for which it was adopted.

a. Underlying the holdings in both circuits is an unwillingness to accept the fact that the two prior felony exclusion, like its companion limitations on eligibility, was adopted for the purpose of allocating limited re-

[16] *Watson*, *Williams* and *Chicquelo* involved prior *narcotics* offenses. *Hamilton* and *Bishop* involved, as does this case, convictions for non-narcotic offenses.

sources to those deemed by Congress most likely to benefit from their use. The District of Columbia Circuit simply rejected this purpose, holding that "[s]o long as Congress has provided a procedure whereby the likelihood of rehabilitation is determined by the trial judge, who may seek the assistance of the Attorney General in that regard, there is no rational justification for a conclusive presumption that an addict with two or more prior felony convictions is not rehabilitable." *United States* v. *Hamilton*, *supra*, 462 F. 2d at 1192. The First Circuit found that reliance upon allocation of resources as a purpose is "vitiated" by the fact that repeat felons can receive treatment after a regular criminal sentence (*United States* v. *Bishop*, *supra*, 469 F. 2d at 1343, n. 11),[11] and held that the exclusion "is aimed *primarily* at avoiding 'light' sentencing for or the introduction into NARA centers of dangerous criminals, not to weed out those unlikely to be rehabilitated." 469 F. 2d at 1346 (emphasis added). It also took note of the trial court's duty to determine likelihood of rehabilitation in individual cases, and assumed that it is only "judicial resources" which are conserved by the exclusion. 469 F. 2d at 1344.

The District of Columbia Circuit incorrectly characterized the exclusion as a "conclusive presumption

[11] As indicated in our supplemental memorandum in this case withdrawing our opposition to the grant of certiorari, priority for treatment goes to those offenders who are committed under Title II. Non-NARA offenders can obtain treatment for their addiction only to the extent that facilities to care for them are available beyond those required for NARA commitments.

that an addict with two or more prior felony convictions is not rehabilitable." *United States* v. *Hamilton*, *supra*, 462 F. 2d at 1192. Congress did not so conclude; instead, it compared the prospects for rehabilitation of such addicts with the prospects of those with fewer than two prior convictions, and concluded that the prospects of the latter group were sufficiently better than those of the former to justify devoting the limited resources being made available to attempts to cure addicts without substantial criminal records. Nor, as the First Circuit appeared to suggest, were the resources that Congress sought to apply most productively primarily those of the judiciary. Part of the judicial process of determining likelihood of rehabilitation under Title II involves committing the convicted addict for study. But, as noted above (p. 12), resources devoted to addicts committed for study could otherwise be used by addicts committed for treatment.

The First Circuit was equally incorrect when it held that the "primary" purpose of the exclusion is punitive, rather than allocative of resources. Concededly, the limitations on eligibility were intended in part to protect society by assuring that NARA would not permit multiple offenders to escape punishment. But, as we have shown, the punitive and allocative functions were presented as two sides of the same coin—the multiple offender was thought to be both deserving of punishment and a bad prospect for rehabilitation, while the addict without a substantial record was thought to be both particularly deserving of treatment and a good prospect for rehabilitation. In any event, this Court

has recently warned against "pick[ing] and choos[ing] among legitimate legislative aims to determine which is primary and which subordinate." *McGinnis, Commissioner of Correction* v. *Royster*, *supra*, slip op. at 13. The Court there further explained (*id.* at 14):

> Legislation is frequently multipurposed; the removal of even a "subordinate" purpose may shift altogether the consensus of legislative judgment supporting the statute. Permitting nullification of statutory classifications based rationally on a nonprimary legislative purpose would allow courts to peruse legislative proceedings for subtle emphases supporting subjective impressions and preferences. The Equal Protection Clause does not countenance such speculative probing into the purpose of a coordinate branch.

It is thus not appropriate, in determining whether there is a rational justification for the two prior felony exclusion, to divorce that exclusion from the allocative function which Congress intended for it.

b. Having improperly dismissed the exclusion's allocative function, the courts in *Bishop*, *Watson*, and *Hamilton*, found "anomalies, in the root sense of inequalities" (*United States* v. *Bishop*, *supra*, 469 F. 2d at 1343) in the exclusion.

The "anomalies" identified reflect, in large part, simply the courts' disagreement with the legislature's judgment. In *Bishop*, the disagreement related to the relative weight to be given to past convictions in comparison to current ones, or to be given to a number of

convictions as indicating an established pattern of behavior. In *Hamilton*, it related to the possible deterrent effect of the exclusion: "it may be irrational to assume that an addict's sensitivity to deterrent influences can be measured by anything other than the strength of his addiction." *United States* v. *Hamilton*, *supra*, 462 F. 2d at 1194, n. 7.

To the extent that the court in *Bishop* found an inconsistency between Title III and the other two titles, it overlooked the differences between that title and the rest of the Act. Although it is true that addicts with more than two offenses may be considered for civil commitment under Title III but not under Titles I and II, the provisions of Title III are not applicable to those charged with current offenses, and thus there is no danger that civil commitment is being misused to evade possibly appropriate penal sanctions. Moreover, since the study preceding commitment under Title III is ordinarily made by court-appointed private physicians, the pre-commitment burden on the resources of the government's rehabilitation program is avoided. For these reasons, Congress could rationally conclude that it was not necessary to limit those eligible for Title III commitment as stringently as was appropriate under Titles I and II.

In any event, the two prior felony exclusion and its companion limitations on eligibility bear a rational relationship to the legitimate aim of allocating the limited resources which Congress was willing to commit to the new and experimental social welfare pro-

gram that it was instituting. It is not fatal that some addicts with more than two felony convictions might be more "deserving" of a non-criminal sentence than some addicts who are eligible for such commitment as the Act was drawn, or that some people in the former class might actually be better prospects for rehabilitation than some individuals in the latter class. The essence of the legislative function is the exercise of a policy judgment about general categories. Minor inconsistencies in the eligibility limitations are therefore immaterial. A "law need not be in every respect logically consistent with its aims to be constitutional." *Williamson* v. *Lee Optical Co., supra,* 348 U.S. at 487–488. "In the area of * * * social welfare, a [legislature] does not violate the equal protection clause merely because the classifications made by its laws are imperfect." *Dandridge* v. *Williams, supra,* 397 U.S. at 485.

Congress had to draw the line somewhere to keep its pilot project within manageable bounds, and Congress could rationally determine that in general the rehabilitation prospects are *likely* to be better for those whose prior criminal conduct has been minimal, and that a person with a shorter criminal record is probably more deserving of non-penal treatment than a habitual offender. The standard to be applied in judging the validity of the classification system that Congress chose is therefore the one enunciated this Term in *McGinnis, Commissioner of Correction* v. *Roy-*

ster, supra, slip op. at 7—a case that also involved classifications for purposes of post-conviction rehabilitation:

> [T]his Court has observed that "the problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *City of Chicago,* 228 U.S. 61, 69–70 (1913). We do not wish to inhibit [legislative] experimental classifications in a practical and troublesome area, but inquire only whether the challenged distinction rationally furthers some legitimate, articulated [legislative] purpose.

The classification here adopted by Congress meets this standard.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MARSHALL *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-5881. Argued October 16-17, 1973—Decided January 9, 1974

Petitioner, who had three prior felony convictions, moved for commitment as a narcotic addict pursuant to Title II of the Narcotic Addict Rehabilitation Act of 1966 (NARA), following a fourth felony conviction. The District Court held that the NARA's two-prior-felony exclusion precluded the requested commitment, rejecting petitioner's post-sentence motion to vacate his sentence on the ground that the two-prior-felony exclusion violated equal protection as embodied in the Fifth Amendment. The Court of Appeals affirmed. *Held:* Title II of NARA does not deny due process or equal protection by excluding from rehabilitative commitment, in lieu of penal incarceration, addicts with two or more prior felony convictions, since Congress could rationally assume that an addict with a multiple-felony record is likely to benefit less from rehabilitative treatment, present a possible impediment to the successful treatment of others, and be a greater threat to society upon release, because of that record. Pp. 5-13.

(a) In adopting the two-felony exclusion Congress sought to exclude from NARA treatment (1) those less likely to be rehabilitated thereby, and (2) those with a "history of serious crimes." Pp. 6-8.

(b) Congress could reasonably assume that because of the nature of addiction treatment the multiple-felony offender would less likely benefit from and might interfere with a rehabilitation program. Pp. 8, 11.

(c) Congress should have a wide latitude in formulating an experimental program like NARA, involving as it does medical and scientific uncertainties. Pp. 10-11.

(d) In excluding multiple offenders Congress could safeguard that experimental program from possible improper exploitation

Syllabus

and also avoid a possible unacceptable risk to society represented by a reduced level of deterrence. Pp. 12–13.

470 F. 2d 34, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72-5881

Robert Edward Marshall, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 9, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider petitioner's claim that the provisions of Title II of the Narcotic Addict Rehabilitation Act of 1966, 18 U. S. C. §§ 4251–4255, deny due process and equal protection by excluding from discretionary rehabilitative commitment, in lieu of penal incarceration, addicts with two or more prior felony convictions. The circuits are in apparent conflict on this question. See *Watson* v. *United States*, — U. S. App. D. C. —, 439 F. 2d 442 (1970); *United States* v. *Hamilton*, — U. S. App. D. C. —, 462 F. 2d 1190 (1972); *United States* v. *Bishop*, 469 F. 2d 1337 (CA1 1972); and *Macias* v. *United States*, 464 F. 2d 1291 (CA5 1972), cert. pending No. 72-5539; *Marshall* v. *United States*, 470 F. 2d 34 (CA9 1972).

(1)

Petitioner, Robert Edward Marshall, pleaded guilty to an indictment charging him with entering a bank with intent to commit a felony, in violation of 18 U. S. C. § 2113 (a). At sentencing, petitioner requested that he be considered for treatment as a narcotic addict pursuant to Title II of the Narcotic Rehabilitation Act of 1966 (NARA). The sentencing judge, after noting peti-

tioner's three prior felony convictions for burglary, forgery, and possession of a firearm, concluded that the exclusion of persons with two prior convictions from the discretionary provisions of the Act as set forth in 18 U. S. C. § 4251 (f)(4) [1] did not permit commitment under

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[1] 18 U. S. C. § 4252 (a) provides in relevant part that:

"Following the examination provided for in section 4252, if the court determines that an eligible offender is an addict and is likely to be rehabilitated through treatment, it shall commit him to the custody of the Attorney General for treatment under this chapter. . . ."

18 U. S. C. § 4251 (f) provides that:

"(f) 'Eligible offender' means any individual who is convicted of an offense against the United States, but does not include—

"(1) an offender who is convicted of a crime of violence.

"(2) an offender who is convicted of unlawfully importing or selling or conspiring to import or sell a narcotic drug, unless the court determines that such sale was for the primary purpose of enabling the offender to obtain a narcotic drug which he requires for his personal use because of his addiction to such drug.

"(3) an offender against whom there is pending a prior charge of a felony which has not been finally determined or who is on probation or whose sentence following conviction on such a charge, including any time on parole or mandatory release, has not been fully served: *Provided*, That an offender on probation, parole, or mandatory release shall be included if the authority authorized to require his return to custody consents to his commitment .

"(4) an offender who has been convicted of a felony on two or more prior occasions.

"(5) an offender who has been committed under title I of the Narcotic Addict Rehabilitation Act of 1966, under this chapter, under the District of Columbia Code, or under any State proceeding because of narcotic addition on three or more occasions."

18 U. S. C. § 4251 (d) defines "felony" for purposes of the Act to include:

"[a]ny offense in violation of a law of the United States classified as a felony under section 1 of title 18 of the United States Code, and further includes any offense in violation of a law of any State, any possession or territory of the United States, the District of Columbia, the Canal Zone, or the Commonwealth of Puerto Rico,

NARA. Petitioner was sentenced to 10 years' imprisonment pursuant to 18 U. S. C. § 4208 (a)(2), but the District Judge recommended that petitioner receive treatment for narcotics addiction while incarcerated.[2]

Ten months after being sentenced, petitioner moved to vacate his sentence under 28 U. S. C. § 2255 on the grounds that the two prior felony exclusion of NARA under § 4251 (f)(4) violates equal protection as embodied in the Due Process Clause of the Fifth Amendment.

The District Judge took note of *Watson* v. *United States, supra*, but declined to follow that holding. The District Judge also noted that there was no showing, as in *Watson, supra*, that petitioner's prior convictions and his drug addiction were related[3] and since his prior convictions did not relate to traffic in narcotics, the provisions of 18 U. S. C. § 4251 (f)(2) did not apply. The District Judge determined that given the purposes of the

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which at the time of the offense was classified as a felony by the law of the place where that offense was committed. . . ."

[2] Prisoners not eligible for treatment under NARA may receive the benefit of programs comparable to those provided under NARA, available to narcotics addicts under administrative processes of the Federal Bureau of Prisons. See generally Drug Abuse Programs Manual, Bureau of Prisons Policy Statement No. 8500.1 (Apr. 20, 1973).

[3] Because the two prior felony convictions in *Watson* were for violations of narcotics laws, there was some conjecture that the rationale of that case was limited to its facts. In *United States* v. *Hamilton*, 462 F. 2d 1190 (1970), the Court of Appeals for the District of Columbia, the same court which decided *Watson*, dispelled all doubt by holding the two prior felony exclusion to be unconstitutional where the defendant has been convicted of one prior narcotics law felony and four prior non-narcotics felony offenses. Subsequently, in *United States* v. *Bishop*, 469 F. 2d 1337 (1972), the Court of Appeals for the First Circuit also held the exclusion of § 4251 (f)(4) to be unconstitutional where the prior felonies were non-narcotices violations.

statute, Congress had not acted arbitrarily in providing different disposition standards for convicted persons with records of prior felony convictions from those without such convictions, these classifications being related to eligibility for rehabilitative commitment under NARA.

The Court of Appeals viewed petitioner's § 2255 petition as a motion under Rule 35 of the Federal Rules of Criminal Procedure for correction of an illegal sentence, and held the statutory classification constitutionally permissible, noting its disagreement with the decisions in *Watson, supra,* and *United States* v. *Hamilton, supra.* Viewing the Act in its entirety,[4] the Court of Appeals concluded that Congress expressly limited the reach of the Act to addicts most likely to be rehabilitated through treatment and provided an exclusion as to convicted persons having two or more prior convictions.

Concluding there is no "fundamental right" to rehabilitation from narcotics addiction at public expense after conviction of a crime, and there being no "suspect" classification under the statutory scheme, the Court of Appeals considered the correct standard to be whether the statutory classification bore "some relevance to the purpose for which the classification is made." *Baxtrom* v. *Herold,*

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[4] In 1966, Congress enacted the Narcotic Rehabilitation Act, Pub. L. 89-793, 80 Stat. 1438. Title I of the Act, 28 U. S. C. §§ 2901-2906, provides for civil treatment commitment prior to trial of persons *charged* with federal crimes, and dismissal of the charges upon successful completion of the treatment. Title II, 18 U. S. C. §§ 4251-4255, provides for similar commitment in lieu of imprisonment for those *convicted* of a federal crime. Title III, 42 U. S. C. §§ 3411-3426, provides for civil commitment of persons not involved in the criminal process. In each case, the court must, after ordering commitment for examination, determine whether the individual is an addict, as defined by the statute 28 U. S. C. § 2901 (a), 18 U. S. C. § 4251 (a), 42 U. S. C. § 411 (a), and whether he "is likely to be rehabilitated through treatment," 28 U. S. C. § 2902 (b), 18 U. S. C. § 4253 (a), 42 U. S. C. § 3415.

338 U. S. 107, 111 (1966); *Dandridge* v. *Williams*, 397 U. S. 471 (1970). The court reasoned that Congress adopted the challenged standards in an effort to restrict eligibility to those most likely to respond to treatment and held that Congress could not be said to have acted irrationally in so doing. The District Court's denial of petitioner's motion to vacate his sentence, 470 F. 2d 34 (1972) was affirmed. We granted certiorari, 410 U. S. 954 (1973). We agree with the District Court and Court of Appeals reading of the statute and affirm.

(2)

Petitioner concedes that the concept of equal protection as embodied in the Due Process Clause of the Fifth Amendment, see *Bolling* v. *Sharpe*, 347 U. S. 497 (1954), does not require that all persons be dealt with identically, but rather that there be some "rational basis" for the statutory distinctions made, *McGinnis* v. *Royster*, 410 U. S. 263, 270 (1973), or that they "have some relevance to the purpose for which the classification is made." *Baxtrom* v. *Herold*, 383 U. S. 107, 111 (1966); *Rinaldi* v. *Yeager*, 384 U. S. 305, 309 (1966). See also *James* v. *Strange*, 407 U. S. 128 (1972); *Humphrey* v. *Cady*, 405 U. S. 504 (1972). He argues that no such nexus exists under the classification provided by the challenged statute.

The broad purpose of Congress in enacting NARA, as set forth in the Act itself, was:

> "[T]hat certain persons charged with or convicted of violating Federal criminal laws, who are determined to be addicted to narcotic drugs, and likely to be rehabilitated through treatment, should, in lieu of prosecution or sentencing, be civilly committed for confinement and treatment designed to effect their restoration to health, and return to society as useful members." 42 U. S. C. § 3401.

See also H. R. Rep. No. 1486, 89th Cong., 2d Sess. (1966), 1966 U. S. Code Cong. & Admin. News, pp. 4245, 4248 ("... to provide for the treatment and rehabilitation of narcotic addicts when they are charged with or convicted of offenses against the United States."); S. Rep. No. 1667, 89th Cong., 2d Sess., 12 (1966). Congress recognized that some relationship between drug addiction and crime probably existed, and concluded that prosecution and imprisonment of all addicts without more would not cure addiction or retard the rising addiction rate, and that a rehabilitative rather than a purely penal approach to the problem was called for. *Id.*, at 13, 17.

It was not the purpose of Congress, however, to make every addict eligible for civil commitment simply by reason of addiction. The congressional intent in adopting the statutory exclusion based on prior convictions which is challenged here is somewhat less explicitly defined,[5] but the objectives emerge clearly when the Act is read as a whole. Having recognized some nexus between drug addiction and crime, Congress specifically sought to insure that any program aimed at providing for the treatment of drug addiction would not hinder traditional efforts to deal effectively with the strictly

[5] The Act was based on the House-passed Administration bill, H. R. 9167. The two-felony exclusion is derived from that bill, which contained all five of the final exclusions in some form. All of the other House bills considered by the House Committee, but one, also had a two-felonies exclusion. See Hearings on H. R. 9051, 9159, 9167 and Related Bills before Subcommittee No. 2 of the House Committee on the Judiciary, 89th Cong., 1st and 2d Sess., at 1–14, 17, 20–53. The Senate bill, S. 2191, did not, however, contain the two-felonies exclusion, see S. Rep. No. 1667, 89th Cong., 2d Sess., at 7–8. In conference, where Titles I and II of the House bill were adopted, the two-felonies exclusion was incorporated into the final bill. See Conference Rep. No. 2316, 89th Cong., 2d Sess., at 2–3, 6; 112 Cong. Rec. 27616.

criminal aspects of the problem.[6] The most explicit statement of congressional intent is found in the House Report, at 9–10:

> "The practical effect of the implementation of the law provided for in the bill, is that strict punishment can be meted out where required to the hardened criminal, while justice can be tempered with judgment and fairness in those cases where it is to the best interest of society and the individual that such a course be followed. . . .
>
> "The definition of 'eligible individuals' as set forth in the bill *insures* that the persons considered as candidates for civil commitment *will not include criminals* charged with violent crimes *or be those whose record disclose a history of serious crimes.*"[7] (Emphasis supplied.)

Similarly, the Senate Report notes that:

> "The bill contains sufficient safeguards to assure adequate protection of the general public against the addict who is or may be a hardened criminal, while providing the flexibility necessary to enable the Federal authorities to medically treat the addict

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[6] "After carefully considering the proposed legislation, as amended, the committee finds that it offers a flexible and logical means to provide for the treatment of drug addicts *who are likely candidates for rehabilitation* without essentially changing the authority of law enforcement officials and the courts *to enforce full criminal actions* in appropriate cases." S. Rep. No. 1667, 89th Cong., 2d Sess., at 37. (Emphasis supplied.)

[7] Though actually discussing the definition of "eligible individuals" contained in Title I, concerning civil commitment prior to trial, the identical definitions are contained in Title II, and the House Report indicates that there is no difference between the rationale or the language of the various provisions. See H. R. Rep. No. 1486, 89th Cong., 2d Sess., 12, 20.

who is capable of being cured and rehabilitated. . . ." S. Rep. No. 1667, 89th Cong., 2d Sess., at 13.[8]

It is quite clear that in adopting the two-felonies exclusion, Congress sought first, to exclude from NARA treatment, those less likely to be rehabilitated by such treatment, and second, to exclude those whose records disclosed a "history of serious crimes." The question we are called upon to decide is whether Congress could rationally have assumed that a person who has committed two or more prior felonies and is an addict at the time sentence is to be imposed is likely to be less susceptible to rehabilitation by reason of his past record, thus posing a greater threat to society upon release.

Congress' concern with susceptibility and suitability of multiple offenders to rehabilitative treatment can reasonably be said to derive from its belief that because of the nature of addiction treatment, one who had evidenced greater difficulty in conforming his behavior to societal rules and laws would himself be less likely to benefit from treatment. Additionally, such a person might also pose impediments to the successful treatment of others in the program. As testimony before both the House and Senate committees revealed, the treatment process for

[8] Prior to inclusion of the two-felonies exclusion, the Senate Report described the purposes of the restrictions on eligibility by stating that:

"The net effect is to confine eligibility for the benefits of the legislation to addicts accused of nonviolent crimes who show good prospects for rehabilitation, while retaining strict criminal punishment for dangerous or hardened offenders, narcotics pushers, and persons with a history of failure to respond to treatment." S. Rep. No. 1667, at 17.

The bill which emerged from conference included the two-felonies exclusion, and the report on that bill merely noted that "the conferees for the Senate felt it reasonable to exclude hardened offenders with serious criminal records and persons who have demonstrated their unsuitability for civil treatment." 112 Cong. Rec. 27616.

narcotics addiction is an arduous and a delicate undertaking, particularly in the aftercare stage when the subject is released into an unstructured environment which requires from the addict strict obedience to the limitations of the prescribed regime and full cooperation in the rehabilitative efforts.[9]

Additionally, there is no generally accepted medical view as to the efficacy of presently known therapeutic methods of treating addicts and the prospect for the successful rehabilitation of narcotics addicts thus remains shrouded in uncertainty. Indeed even the premise that drug addiction is one of the significant root causes of crime is not without challenge. See generally The American Disease: Origins of Narcotic Control, Yale Univ. Press (1973). See also American Bar Association and American Medical Association, Joint Committee on Narcotic Drugs, Drug Addiction: Crime or Disease? (1961). As testimony before the Congress revealed, no evidence to date has demonstrated more than a speculative chance for the successful rehabilitation of narcotics addicts. H. R. Rep. No. 1486, 89th Cong., 2d Sess., 51. S. Rep. No. 1667, 89th Cong., 2d Sess., 14. The NARA program was therefore fundamentally experimental in nature. See 112 Cong. Rec. 11896–11901. The suggestion that there is "obscurity" in the holding of this Court in *Powell* v. *Texas*, 392 U. S. 514 (1967), fails to take into account that when courts deal with problems in the administration of criminal law such as those re-

[9] The Senate Report states:

"The process is extremely complex and difficult, involving sustained therapy, principally psychiatric, and perhaps a return to the community in stages, utilizing short visits, a halfway house, a work camp, or some similar facility . . . . In addition, some sanction should be available to enforce the cooperation of the addict in the post-hospitalization period. S. Rep. No. 1667, 89th Cong., 2d Sess., at 15.

lated to drug addiction, alcoholism, "mental disease" and the like, they are necessarily confined to the existing limits of human knowledge in those areas. As MR. JUSTICE MARSHALL noted in *Powell:*

> "The inescapable fact is that there is no agreement among members of the medical profession about what it means to say that 'alcoholism' is a 'disease.' One of the principal works in this field states that . . . 'alcoholism has too many definitions and disease has practically none.'" *Id.*, at 522.

The holding in *Powell* was a candid acknowledgement that the medical uncertainties afford little basis for judicial responses in absolute terms.

When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, *arguendo*, that judges with more direct exposure to the problem might make wiser choices. Accordingly, it would have been a permissible choice for Congress to permit discretionary inclusion in NARA programs of those whose prior offenses were determined to be addiction-related or motivated. Such a discretion might appropriately have been vested in the trial judge much in the manner in which he is now required to exercise his discretion under § 4252 in determining whether the defendant is an addict who is likely to be rehabilitated through treatment.[10] That Congress has not yet chosen to so provide, however, does not render constitutionally impermissible its decision to limit treatment to those with less than two prior felony convictions. *Williamson*

[10] Some criticism has been directed at the cautious use of the NARA program. See Report by the Comptroller General of the United States to the Congress, Limited use of Federal Programs to Commit Narcotics Addicts for Treatment and Rehabilitation (1971).

v. *Lee Optical Co.*, 348 U. S. 483 (1955); *Dandridge* v. *Williams*, 397 U. S. 471 (1970); *McGowan* v. *Maryland*, 366 U. S. 420 (1961); *Jefferson* v. *Hackney*, 406 U. S. 535 (1972).

It should be recognized that the classification selected by Congress is not one which is directed "against" any individual or category of persons, but rather it represents a policy choice in an experimental program made by that branch of Government vested with the power to make such choices. The Court has frequently noted that legislative classifications need not be perfect or ideal. The line drawn by Congress at two felonies for example might, with as much soundness, have been drawn instead at one, but this was for legislative, not judicial choice. *McGinnis* v. *Royster*, *supra*; *Powell* v. *Texas*, 392 U. S. 514, 539–540 (concurring opinion). Against this background, it cannot be said that it was unreasonable or irrational for Congress to act on the predicate reflected in the legislative history and explicitly stated in the exclusion provision of § 4251 (f)(4), that a person with two or more prior felonies would be less likely to adjust and adhere to the disciplines and rigors of the treatment program [11] and hence is a less promising prospect for treatment than those with lesser criminal records.

In addition, Congress might rationally have sought to exclude from NARA treatment centers those it thought might be potentially disruptive elements within the sensitive environment of a drug treatment program.[12] Nor

[11] Similarly rational was the related congressional choice to give priority of treatment to convicted addicts at an early stage in their lives. Although not invariably so, those with no felony record may well be younger, as a group, than those with multiple convictions and this notwithstanding that the median age of serious offenders has shown a steady downward trend.

[12] Virtually all drug treatment programs include group therapy and involve extensive personal interaction between those in the treat-

can Congress be said to have acted without reason in determining that an addict with multiple convictions was more "hardened" and thus a greater potential danger to society on early release than the addict who had committed one prior felony or none.

Under NARA, Congress provided for comparatively lenient sentencing possibilities,[13] but in excluding addicts with two prior felonies, it sought to assure that in an essentially experimental program to which limited resources were allocated these features would not be exploited by persons who were viewed by Congress as primarily anti-social and only secondarily addicts.[14] In addition, since the fact of two prior felony convictions

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ment program. In addition, there are strict institutional rules regarding virtually every aspect of the addict's daily existence which he is expected to follow, and the existence of such authority is considered vital to successful treatment, both in the program itself, and particularly during the aftercare period. See Cole, "Report on the Treatment of Drug Addition," Task Force Report: Narcotics and Drug Abuse, The President's Commission on Law Enforcement and Administration of Justice, 135–147 (1967); Petersen, Yarvis & Farkas, The Federal Bureau of Prisons Treatment Program for Narcotics Addicts (1969); Federal Drug Abuse Programs, A Report Prepared by the Task Force on Federal Heroin Addiction Programs and Submitted to the Criminal Law Section of the American Bar Association and the Drug Abuse Council, 241–278, 393–416 (1972), Vaillant & Rasor, "The Role of Compulsory Supervision in Treatment of Addication," 30 Federal Probation 53–59 (1966).

[13] Under 18 U. S. C. § 4253, an individual who is determined to be eligible for NARA treatment is to be committed to the custody of the Attorney General for treatment for "an indeterminate period of time, not to exceed ten years, but in no event shall it exceed the maximum sentence that could otherwise have been imposed." 18 U. S. C. § 4254 then allows for conditional release of an offender, upon the requisite determination, any time after the offender has received six months' treatment. Thereafter, he is legally on parole under the jurisdiction of the Board of Parole, 18 U. S. C. § 4255.

[14] See 112 Cong. Rec. 11813.

may be said to evidence a lesser susceptibility to deterrence, the reduced level of deterrence implicit in the benign policy of Title II could reasonably be thought by Congress to create an unacceptable risk to society and thus require the exclusion of such persons from NARA disposition.

We therefore hold that Title II of the Narcotic Addict Rehabilitation Act of 1966, 18 U. S. C. §§ 4251–4255, does not constitute a denial of due process or equal protection by excluding from rehabilitative commitment, in lieu of penal incarceration, addicts with two or more prior felony convictions.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 72-5881

Robert Edward Marshall, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 9, 1974]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN concur, dissenting.

Title II of the Narcotics Addict Rehabilitation Act of 1966 authorizes treatment in lieu of prison sentence for those addicts convicted of an offense against the United States who the sentencing court has determined are "likely to be rehabilitated through treatment." 18 U. S. C. § 4252 (a). Petitioner was denied treatment for his disease of narcotics addiction, even though no determination was ever made that he is not likely to be rehabilitated through treatment, because the Act excludes from consideration for the NARA program any person with two or more prior felony convictions. 18 U. S. C. § 4251 (f)(4). Two Courts of Appeals have concluded that the two felony exclusion, though intended by Congress to serve admittedly legitimate ends, is not a sufficiently rational means towards those ends to withstand scrutiny under the Equal Protection Clause.[1]

[1] See *Watson* v. *United States*, — U. S. App. D. C. —, 439 F. 2d (1970); *United States* v. *Hamilton*, — U. S. App. D. C. —, 462 F. 2d 1190 (1972); *United States* v. *Bishop*, 469 F. 2d 1337 (CA1 1972). In addition to the statute's flaws noted in this opinion, these decisions also point out other anomalies implicit in the two felony exclusion. Under the Act, an addict who has engaged in trafficking to support his own habit would be eligible for non-

The Court today, while alluding to some of the statute's serious flaws, nevertheless finds it constitutional. I must respectfully dissent.

In the present case the Court of Appeals analyzed the constitutionality of the two felony exclusion by focusing on what it perceived to be this Court's two-tiered approach to equal protection issues. See 470 F. 2d 34, 38 (1972). Under this view, classifications involving a "fundamental interest" or "suspect classification" are subject to so-called "strict scrutiny," while all other statutes are tested by a standard of minimal rationality. While the Court today neither expressly endorses nor rejects this approach, its analysis is so deferential as to confirm an earlier observation that, except in cases where the Court chooses to invoke strict scrutiny, the Equal Protection Clause has been all but emasculated. See

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criminal disposition under Tit. II, whereas a nontrafficking addict found, for the third time, in possession of narcotics for his own use would not. This result, "is curiously at odds with the Congressional preoccupation, underlying the Narcotic Addict Rehabilitation Act, with the distinction between traffickers and non-traffickers, and the reiterated purpose that 'strict punishment . . . be meted out where required to the hardened criminal, while justice . . . be tempered with judgment and fairness in those cases where it is to the best interest of society and the individual that such a course be followed.'" *Watson* v. *United States, supra,* — U. S. App. D. C., at —, 439 F. 2d, at 456. Other anomalies stem from the definition of "felony" in 18 U. S. C. § 4251 (d). "Two persons who both had twice previously been convicted for the identical crime of possession of marijuana might be treated different under [the two felony exclusion] simply because one committed his crimes in Florida where possession over five grams is a felony and the other committed his in New York where it is only a misdemeanor . . . or because one committed both his crimes before May 1, 1971, and the other committed them after that date, when the federal offense of marijuana possession was reduced to a misdemeanor for first offenders . . . ." *United States* v. *Bishop, supra,* 469 F. 2d, at 1337.

San Antonio School District v. *Rodriguez*, 411 U. S. 1, 98 (MARSHALL, J., dissenting).[2]

At the outset, then, I must once again take issue with the Court's apparently rigidified approach to equal protection issues. See, *e. g.*, *Dandridge* v. *Williams*, 397 U. S. 471, 519–530 (1970) (MARSHALL, J., dissenting); *Richardson* v. *Belcher*, 404 U. S. 78, 90–91 (1971) (MARSHALL, J., dissenting; *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1, 98–110 (1973) (MARSHALL, J., dissenting). True, as the Court of Appeals found, this case does not fit into any neat "fundamental interest" or "suspect classification" mold. Notwithstanding, I find it hard to understand why a statute which sends a man to prison and deprives him of the opportunity even to be considered for treatment for his disease of narcotics addiction,[3] while

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[2] Cf. Gunther, The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

[3] Drug addiction is specifically referred to as a "disease" in the Senate Report recommending enactment of Pub. L. No. 92–420, 86 Stat. 677 (1972), which expanded the NARA program to include methadone maintenance. See Senate Report No. 92–1071, 92d Cong., 2d Sess., at 3 (1972). The most widely accepted and authoritative definition of heroin addiction is one promulgated by the World Health Organization, which lists its characteristics as:

"(1) an overpowering desire or need to continue taking the drug and to obtain it by any means; the need can be satisfied by the drug taken initially or by another with morphine-like properties;

"(2) a tendency to increase the dose owing to the development of tolerance;

"(3) a psychic dependence on the effects of the drug related to a subjective and individual appreciation of those effects; and

"(4) a physical dependence on the effects of the drug requiring its presence for maintenance of homeostasis and resulting in a definite, characteristic, and self-limited abstinence syndrome when the drug is withdrawn."

United States v. *Moore*, — U. S. App. D. C. —, —, F. 2d —, —, No. 71–1252 (May 14, 1973) (Wright, J., dissenting), quoting

providing treatment and suspension of prison sentence to others similarly situated, should be tested under the same minimal standards of rationality that we apply to statutes regulating who can sell eyeglasses or who can own pharmacies. See *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483 (1955); *North Dakota State Bd. of Pharmacy* v. *Snyder's Drug Stores, Inc.*, — U. S. — (1973). This case does not involve discrimination against business interests more than powerful enough to protect themselves in the legislative halls, but the very life and health of a man caught up in the spiralling web of addiction and crime.

I press my disagreement no further here, for a careful analysis of the two felony exclusion and the ends Congress sought to achieve shows that the exclusion is a totally irrational means toward those ends. If deferential scrutiny under the Equal Protection Clause is to mean more than total deference and no scrutiny, surely it must reach the statutory exclusion involved in this case.

One of Congress' primary purposes in enacting the two felony exclusion was to limit treatment to those convicted persons considered most deserving of the special benefits provided by the new law. As the Government argues in its brief, Congress wanted to grant the benefits of treatment to those who "were primarily addicts, and only secondarily criminals." Brief for the United States, at 6. To state the goal more precisely, Congress intended to give treatment to those addicts whose criminal activity was only a symptom or product of their addiction. The

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World Health Organization Expert Committee on Addiction-Producing Drugs, Thirteenth Report, World Health Organization Technical Report Series No. 273, at 13 (1964). Congress has similarly defined an "addict" to include one "who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." 21 U. S. C. § 802 (1).

House Report recognized that "Narcotic addicts in their desperation to obtain drugs often turn to crime in order to obtain money to feed their addiction." 1966 U. S. Code Cong. & Admin. News 4249. On the other hand, Congress knew there were others who were first of all criminals, and only secondarily addicts—that is, persons whose criminal activity was independent of their narcotics addiction. It was thought important to preserve strict criminal penalties for such hardened criminals, rather than permit them to use the fact of their addiction to escape punishment for a crime. See 112 Cong. Rec. 11813.

The plain fact of the matter, however, is that the two felony exclusion does not further this legislative end, as the following examples demonstrate. Defendant *A*, with a prior felony conviction for assault with intent to commit murder, is convicted of stealing funds from a national bank. Neither crime was in any way related to narcotics addiction. In fact, *A* was not even an addict at the time he committed the crimes, but has become an addict during the pendency of his bank theft trial. Defendant *B*, who has two prior felony convictions for narcotics offenses, is convicted of possession of heroin for his own use. Given the above stated legislative purpose, one would think that Defendant *B*, all of whose criminal activity was related to his narcotics addiction, would be eligible for NARA treatment, while Defendant *A*, none of whose criminal activity was so related, would not be eligible. But just the opposite is true, because of the two felony exclusion.[4]

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[4] Defendant *A* would not be excluded from the program under the statutory exclusion of "an offender who is convicted of a crime of violence," 18 U. S. C. § 4251 (f) (1), since that exclusion applies only to a person convicted of a crime of violence in the same proceeding in which Tit. II is considered as an alternative to prison sentence. Thus, if one has just been convicted of a "crime

The problem with the statute is not, as the majority would have it, that Congress chose two felonies as the cutoff point rather than one or three. Rather, the statute fails to achieve the legislative end of discriminating between people who are mainly addicts and those who are mainly criminals because a numerical test was used to achieve a qualitative result for which it was totally unsuited.

A second basic purpose sought to be achieved through the two felony exclusion was to restrict NARA treatment to those persons deemed likely to be rehabilitated. But the two felony rule again is not a rational means toward that end. To begin with, it must be remembered that the statute itself limits participation in the program to those persons who, after an examination in the custody of the Attorney General, are determined to be addicts "likely to be rehabilitated through treatment." The two felony exclusion, to the extent it is justified by reference to this policy, amounts to a conclusive and irrebuttable presumption that a person with two or more felony convictions is not likely to be rehabilitated through treatment. We have only recently reiterated that "permanent irrebutable presumptions have long been disfavored," see *Vlandis* v. *Kline*, 412 U. S. 441, 446 (1973). This is particularly true where an interest as important as personal liberty is at stake. And as one would expect of medical problems in general, whether a particular individual's disease of narcotics addiction is susceptible to treatment is the very kind of question which requires an individualized determination.[5]

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of violence" as defined in § 4251 (b), one is disqualified from the program under § 4251 (f) (1), while if one had previously been so convicted but is now convicted of a nonviolent crime, one would be eligible. See *United States* v. *Bishop*, *supra*, 469 F. 2d, at 1344.

[5] Congressman Cellar remarked: "Each individual case must be

The two felony presumption of nonamenability to rehabilitation is also plainly contrary to fact. The Administrator of the California Youth and Adult Correction Agency pointed out that the two or more felony provision "would result in a great many persons being excluded who might prove to be the best subjects for the program." [6] As he indicated, it was the experience of the California program,[7] upon which the federal program was modeled in large part, that "persons who have had as many as four or five previous convictions and have grown older in years respond to the program better than some of the younger persons earlier in their careers." [8] Nor was any contrary evidence presented to Congress.

Another purpose of the two felony exclusion was to weed out those violent, antisocial individuals whose

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scrutinized to determine whether civil commitment will be efficacious. I submit that it should not be Congress who, at long distances, makes such determinations. In the absence of the facts of individual cases, these decisions can only be arbitrary." See Civil Commitment and Treatment of Narcotics Addicts, Hearings before Subcomm. No. 2 of the House Comm. on the Judiciary, 89th Cong., 1st and 2d Sess., at 55 (1965).

[6] The Narcotic Rehabilitation Act of 1966, Hearings before a Special Subcomm. of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess., at 91 (1966).

[7] See Cal. Welf. & Inst. Code §§ 3050–3054, 3104–3107, and 3109 (1972). The California statute has no exclusion similar to the two felony exclusion. It is also interesting to note that while the California Act, like the federal Act, excludes persons convicted of certain crimes of violence, see *id.*, § 3052, the statute also provides that even in the case of an offender convicted of a crime of violence, "the judge may request the district attorney to investigate the facts relevant to the advisability of commitment pursuant to this section. In unusual cases, wherein the interest of justice would best be served, the judge may, with the concurrence of the district attorney and the defendant, order commitment notwithstanding" the crime of violence exclusion. *Id.*, § 3051.

[8] Hearings, *supra*, n. 5, at 153.

participation in the program would interfere with the rehabilitation of others. But again, Congress has drawn a numerical test to achieve a qualitative result for which it is manifestly unsuited. An addict with a prior conviction for attempted murder can participate in the NARA program, while one whose prior record includes two convictions for possession of narcotic drugs cannot.[9]

It makes no sense to deem an addict a "hardened criminal" unworthy or unsuited for treatment simply because he has engaged in criminal activity which may have been the symptom or product of his addiction. Congress enacted NARA because it knew that almost all addicts are hardened criminals in this sense. Not only are they driven to rob and steal in order to obtain money to sustain their habits, but their habits themselves involve the commission of felonies every day of their lives. As the House Report stated, the purpose of the bill was "to treat the unfortunate addict who is capable of rehabilitation to render assistance in a manner which will enable him to extricate himself from an otherwise hopeless and repetitious pattern of addiction and crime." [10] To deny treatment to those addicts who have been convicted of a certain number of felonies, without regard to the relationship between their addiction and the prior offenses, is, in the

[9] The statute's disregard of all time limits is further evidence of its arbitrary nature. "All prior felonies are counted—whether a joy-ride by a peer-imitating teenager or a rape committed by a 35-year-old sex deviate during the pendency of the proceedings in which sentence is about to be imposed. Any intervening period between felonies of good behavior or attempts at rehabilitation are ignored; a person is thought to harden as a criminal merely because he accumulates a fixed number of judgments, regardless of changes in his personality or personal circumstances over time." *United States* v. *Bishop*, *supra*, 469 F. 2d, at 1345.

[10] 1966 U. S. Code Cong. and Admin. News 4249.

apt words of Congressman Ryan, like "building a sanatorium to treat tuberculosis, and then refusing admittance to patients with a contagious disease." 112 Cong. Rec. 11812.[11]

It is argued that the NARA program is essentially experimental in nature, and that courts should therefore be particularly reluctant to interfere with legislative decisions. But this observation must be tempered by a realization that we are experimenting here with people's lives and health. And it can hardly be said that a program now in its seventh year of operation is still basically experimental. Only last year, Congress broadened the NARA program to include methadone maintenance as part of the available rehabilitative treatment, recognizing the many cases of addiction which, though

[11] The majority's contention, see n. 2, *ante*, that prisoners not eligible for the NARA program are not actually denied treatment because they may receive the benefits of similar programs within the Federal Bureau of Prisons is simply contrary to fact. As the Government itself indicates in its brief, treatment begins immediately upon commitment under NARA, and the offender is eligible for conditional release on parole after six months of treatment. Brief for the United States, at 2, n. 1. Addicts not committed under NARA, however, are not placed in any rehabilitation program until about one year before their anticipated release. *Ibid.* Thus, an addict like petitioner, who received a 10-year sentence, will have to go many years without treatment for his disease because of his exclusion from the NARA program.

More importantly, we are told that the Bureau of Prisons does not have sufficient facilities for treatment of the approximately 5,000 federal prisoners estimated to suffer from some degree of drug dependency. In the Government's own words: "Thus, although commitment under NARA assures treatment, a judicial recommendation for similar treatment at the time an ordinary criminal sentence is imposed does not." *Ibid.* Indeed, there is no indication in the record in this case that petitioner has yet received any treatment for his addiction, notwithstanding the sentencing court's recommendation of treatment.

not totally curable, can be maintained in a manner which fosters the individual's social rehabilitation and permits him to become a productive member of society. See Pub. L. No. 92–420, 86 Stat. 677 (1972); Senate Report No. 92–1071, 92d Cong., 2d Sess. (1972). With the program widened in this fashion, it seems even more irrational to exclude those who might well benefit from the expanded program through the operation of broad and arbitrary exclusions that do not reasonably further any legitimate congressional purposes.

Finally, we must be mindful that the growing concern with treatment of narcotics addicts has not arisen in a legal vacuum, but has paralleled a growing awareness of the Eighth Amendment questions raised when criminal punishment is imposed for activities which are the symptom or direct product of the disease of narcotics addiction.[12] The Court today, by *dicta* implying that Congress may, consistent with the Equal Protection Clause, deny NARA benefits to persons convicted of narcotics-related offenses because of two prior convictions

[12] In *Watson* v. *United States*, *supra*, it was argued that criminal punishment of an addict for possession of narcotics solely for his own use was impermissible under the Eighth Amendment, but the question was left undecided because not clearly raised before the trial court. See — U. S. App. D. C., at —, 439 F. 2d, at 453. Plenary consideration of the Eighth Amendment problems of convicting addicts for addiction related offenses came in *United States* v. *Raymond Moore*, — U. S. App. D. C. —, — F. 2d —, No. 71–1252 (*en banc*), cert. denied, — U. S. — (1973). Although the defense of addiction was rejected by a 5–4 decision, it now appears that for two members of the majority, the rejection of the Eighth Amendment defense "rested on the availability to the defendant-addict of treatment through NARA." See *United States* v. *Harrison; United States* v. *Lightfoot*, Nos. 72–1106 and 72–1107, — U. S. App. D. C. —, — F. 2d — (August 14, 1973).

This Court has previously dealt with related issues in *Robinson* v. *California*, 370 U. S. 660 (1962), and *Powell* v. *Texas*, 392 U. S. 514 (1968).

for narcotics-related offenses,[13] only exacerbates these Eighth Amendment problems.

Mr. Justice Jackson, himself a strong opponent of substantive due process, once argued that the vitality of the Equal Protection Clause as a ground for constitutional adjudication is that it "does not disable any governmental body from dealing with the subject at hand." Rather, it merely sends the legislature back to the drawing board to draft a statute which more precisely and more evenhandedly solves the problem. See *Railway Express Co.* v. *New York*, 336 U. S. 106, 111–112 (1949) (concurring opinion). I would not deny Congress the right to limit the NARA program to persons whose criminal activity was a product of their addiction, to those who were likely to be rehabilitated, and to those whose presence in a treatment center would not interfere with the rehabilitation of others. But I would have Congress make a second attempt at drafting a statute which actually furthers these ends.

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[13] As the majority opinion indicates, petitioner had three prior felony convictions for burglary, forgery, and possession of a firearm, and there was no attempt to show that his prior convictions related to traffic in narcotics. In addition, there does not appear to have been any showing that petitioner's present conviction for entering a bank with intent to commit a felony was narcotic related. Accordingly, the majority's remarks with respect to Congress' power to exclude from the NARA program persons whose prior and present offense are addiction related or motivated purport to resolve questions not before us in this case. See *ante*, at —.